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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 212

CRANE COMPANY,

Petitioner,

—v.—

WESTINGHOUSE AIR BRAKE COMPANY, A. KING MCCORD, EDWARD J. HANLEY, EDWIN HODGE, JR., FRANK L. MAGEE, JOHN A. MAYER, G. ALBERT SHOEMAKER, ERIC A. WALKER, LAWRENCE E. WALKLEY, JAY V. WILCOX, LESLIE B. WORTHINGTON, AMERICAN STANDARD and BLYTH & CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN W. CASTLES 3D
Attorney for Petitioner
25 Broadway
New York, New York 10004

June 2, 1970

LORD, DAY & LORD
WENDELL DAVIS, JR.
ROGER C. RAVEL
MICHAEL J. MURPHY
of counsel

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Crane Company (hereinafter "Crane") petitions for a writ of certiorari to review that part of the order and judgment of the United States Court of Appeals for the Second Circuit which affirmed the District Court's dismissal after trial of the consolidated complaint brought under Sections 9, 10 and 14 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i, 78j, 78n, and Rules 10b-5 and 14a-9 thereunder, 17 C.F.R. §§ 240.10b-5 and 240.14a-9.

Opinions Below

The opinion of the Court of Appeals (Appendix A, infra, pp. 1a-31a) is reported at 419 F.2d 787 (2nd Cir. December 10, 1969). The opinion of the District Court (Appendix B, infra, pp. 32a-48a) is reported at CCH Fed. Sec. L. Rep. ¶ 92,228 (S.D.N.Y., June 5, 1968). The opinion of the District Court denying Crane's application for a preliminary injunction is unreported. (May 31, 1968) (Appendix C, infra, pp. 49a-56a)

Jurisdiction

The judgment of the Court of Appeals was entered on December 10, 1969. On December 24, 1969, American Standard, Inc. filed a timely petition for rehearing or rehearing *en banc.* On March 4, 1970 the Court of Appeals denied this petition without opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Under Rule 14a-9 of the Securities Exchange Commission is a fact material only if it would influence the vote of a stockholder?

2. Under Rule 14a-9 must corporate directors in recommending to their stockholders approval of a merger into Company A for the purpose of preventing a takeover of their company by Company B:

(i) expressly state that the merger is to prevent such a takeover; and,

(ii) disclose reliable information known only to the directors showing that apart from the prevention of the threatened takeover, the recommended merger would be adverse to the interests of the company's stockholders?

3. Under Rule 14a-9 must corporate directors, in seeking the approval of their stockholders of a merger into Company A to prevent a takeover of their company by Company B, disclose that Company A in concert with their company had, in order to deter shareholders from tendering their shares in response to a tender offer from Company B, artificially inflated the market price of their company's stock by manipulative wash sales?

Statutes and Rules Involved

Section 10(b) of the Securities Exchange Act (See App. D)

Section 14(a) of the Securities Exchange Act (See App. E)

Rule 10b-5 (See App. F)

Rule 14a-9 (See App. G)

Statement of the Case

This action arises out of a year-long struggle (June 15, 1967 to June 7, 1968) by Crane to obtain control of Westinghouse Air Brake Company ("Air Brake") which was defeated by Air Brake's defensive merger on June 7, 1968 into Crane's principal competitor in the plumbing industry, American Standard, Inc. ("Standard"). In 1967 Crane had approximately 10,000 stockholders and sales of over $403,000,000 (Complaint, ¶ 2). Air Brake had approximately 35,000 stockholders and sales of $305,000,000 (id., ¶ 3); Standard had over 54,000 stockholders and sales of approximately $600,000,000 (id., ¶ 5).

Crane commenced buying Air Brake stock as a preliminary to a proposed Air Brake/Crane merger on June 15, 1967. (Ex. 1) In August, Crane proposed merger discussions with Air Brake. (Ex. 2) However, Air Brake's Chairman concluded on the basis of a report of Air Brake's Financial Vice-President that Air Brake itself had all the resources necessary to develop a strong and increasingly profitable business, had key people in good positions, a good balance sheet, improved physical plant and tools, had favorable trends and strong long-term prospects in its major markets and that "the last five years had been good and the next five years should be even better." (Dep. Ex. 18; McCord Ex. 25-A, pp. 57-63) In November, Air Brake rejected a possible merger in Crane in reliance in part upon a report of an independent consulting firm, A. T. Kearney & Co. (Ex. 3; Dep. Ex. 109; Dep. Ex. 9, p. 37) Crane continued to buy Air Brake stock. By December 1, Crane owned enough shares to elect one director to the ten man Air Brake board under cumulative voting. (Ex. 1) Air Brake's management thereupon changed the by-laws to increase the number of shares required to elect a director in order to prevent Crane from obtaining representation. (McCord Ex. 25-A, pp. 111-113; Wadsworth Ex. 25-K, p. 10) Later in December, Air Brake refused Crane's demand to inspect the Air Brake list of stockholders (Ex. 25-A, pp. 117-118) and in January 1968, its chairman stated under oath that Air Brake's interest was to remain independent and not merge with any company. (id., pp. 135-137) On January 15, 1968, A. T. Kearney submitted to Air Brake at the latter's request a study of Crane's principal product line, plumbing, for the express purpose of furnishing Air Brake with information to use in communicating with its stockholders in opposing an anticipated Crane takeover attempt. (Dep. Ex. 137) This study compared Air Brake's sales' growth with those of Crane and Standard, the largest company in the plumbing industry, and concluded that the plumbing industry, which comprised 40% of Crane's business and 75% of Standard's business, was less desirable because of a lower growth potential than the industries in which Air Brake competed, and that a merger of Air Brake into Crane or Standard would involve the Air Brake shareholders in "an averaging downward in growth opportunities under a merged situation."

Crane continued to purchase Air Brake stock (Ex. 1), and on February 20, 1968 filed its 14B statements with the SEC declaring its intention to solicit proxies to elect directors to the Air Brake Board. (Ex. 25-C, p. 380) By February 20, Air Brake's Chairman had concluded that if necessary to prevent a Crane takeover of Air Brake, a merger of Air Brake into another company would be desirable. (Ex. 25-C, pp. 389-390) On February 20, Air Brake's Chairman and several of the Air Brake directors met and decided that Air Brake, in order to prevent a Crane takeover, should merge into Standard. (Mayer Ex. 25-E, pp. 74-91) They knew Standard was the largest company in the plumbing business and was Crane's largest competitor. (id., p. 87) They recognized that the effect of merging Air Brake into Standard would be to prevent a Crane takeover and would, for antitrust reasons, force Crane out of Standard. (id., pp. 87-88) Standard's petition for rehearing to the Court of Appeals described the merger in the following terms: "Here a target corporation turned to Standard for defensive help by way of a negotiated merger" (p. 1).

On March 4, 1968, Air Brake's directors and Standard's directors approved an agreement for a merger of Air Brake into Standard. (Dep. Ex. 93) At that meeting they were furnished with certain internal financial statements of Standard (Dep. Ex. 118) which indicated that Standard's 1967 earnings, apart from those derived from a company (Mosler) acquired in 1967 representing 8% of Standard's sales and a non-recurring war loss recovery, had declined for the fourth consecutive year (Internal Exhibit III of Dep. Ex. 118*) and that Standard had failed to reach its 1967 sales objectives by $35 million and its earnings objectives by $5 million. (Internal Exhibits III, IIIA and IIIB of Dep. Ex. 118; Ex. 25-L, pp. 326-29)

In the week of April 8th, Crane's registered offer to exchange Crane's securities for Air Brake's securities became effective and was to expire, unless extended, at 5:00 P.M. on April 19, 1968. In that same week, Air Brake mailed to its stockholders its proxy statement recommending approval of the proposed merger of Air Brake into Standard. (Ex. 9) The proxy statement warned the stockholders against tendering their Air Brake shares to Crane under the Crane exchange offer (p. 2 of covering letter) and contained the following language:

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* The chart referred to showed that Standard's total income from U.S. and foreign operations, including a non-recurring war loss recovery of $1,246,000, was $11,297,000 as opposed to $10,347,000 in 1966. Without the non-recurring war loss recovery, which in the proxy statement was taken out of income from operations and listed as an extraordinary item "at the suggestion of the Securities and Exchange Commission", Standard's income apart from Mosler would have been $10,053,000. Even this figure included $426,000 in earnings which was admittedly earned in years prior to 1967. (R. 57, p. 760)

> "Your Board of Directors believes that the merger with American-Standard *will benefit shareholders of WABCO by providing them,* on a favorable basis, *interests in new manufacturing and marketing fields in which WABCO is not presently engaged.* American-Standard is an international producer of building products, industrial and technical products, and bank, security and office systems. Upon the joinder of those businesses with WABCO operations, the resulting company will have an established position in the industrial world in the combined, broader based lines of business under competent management; will have available greater resources for expansion and research and will have more diversified sources of business and income." (Emphasis added.) (p. 1)

At page 37, the Air Brake proxy statement revealed that Crane had presented a proposal concerning a possible merger of Air Brake into Crane, that "a study was made by an independent consulting firm* to determine the feasibility of a merger of the two companies," and that "based upon such report, and upon other material available to it, the Board of Directors of the Corporation determined that the proposed merger was not in the best interests of the Corporation or its shareholders."

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* The independent consulting firm was A. T. Kearney & Co. See page 5, *supra.*

On April 19, 1968, the scheduled expiration date of Crane's exchange offer to the Air Brake shareholders, Standard, acting in concert with Air Brake's management, artificially inflated the price of Air Brake stock on the New York Stock Exchange by a series of wash transactions in Air Brake stock.* The Court of Appeals for the Second Circuit subsequently held, in the decision below (419 F.2d 787), that these transactions were fraudulent manipulations in violation of Sections 9 and 10 of the 1934 Act and were done to deter tenders of Air Brake stock to Crane and to defeat Crane's exchange offer in order to prevent a Crane takeover of Air Brake and to implement the Air Brake/Standard merger. The Air Brake shareholders were not informed by either Air Brake or Standard of these transactions.

Prior to the Air Brake shareholders meeting of May 16, 1968, Crane instituted two actions to bar consummation of the Air Brake/Standard merger. The first was against Air Brake and its directors on the ground that Air Brake's proxy statement was false and misleading. The second was against Standard and Blyth & Co., Inc. ("Blyth"), its financial advisor, on the ground, among others, that Standard had manipulated the market in Air Brake stock on April 19th. On May 9, 1968, both actions were consolidated for all purposes. After trial the District Court on June 3, 1968 dismissed the entire complaint on the merits.

On June 7, 1968, Air Brake was merged into Standard. As a result, Crane's 32% common stock interest in Air Brake was converted into a 12% interest in Standard preferred stock. On June 13, under an express threat of an antitrust action by Standard's chief executive officer, Crane sold for cash its 12% interest in Standard. The Court of Appeals later held that this sale was forced by Standard's fraudulent manipulation of Air Brake stock on April 19, which it found was in furtherance of Standard's "interest in defeating the Crane tender offer and consummating its own merger with Air Brake." (419 F.2d at 795).

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* The facts in this and the succeeding paragraph are taken from the opinion of the Court of Appeals.

On December 10, 1969, the Court of Appeals for the Second Circuit reversed in part and affirmed in part the judgment of the District Court dismissing Crane's complaint (419 F.2d 787). The dismissal of Crane's claim based on the Air Brake proxy statement was affirmed. The dismissal of Crane's claims based on the manipulation of Air Brake stock was reversed and the case was remanded to the District Court for a determination of Crane's remedies. On December 24, 1968, Standard petitioned the Circuit Court for a rehearing or for a hearing *en banc*. On March 4, 1970, the Circuit Court denied Standard's petition. The instant petition is directed to that part of the Circuit Court's judgment which affirmed the dismissal of Crane's claims based on the Air Brake proxy statement.

Reasons for Granting the Writ

The ruling below conflicts with the decision of this Court in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, decided January 20, 1970. In *Auto-Lite* this Court defined as "material" a fact that "might have been considered important by a reasonable shareholder who is in the process of deciding how to vote." 396 U.S. at 384. Under this standard both (i) the Air Brake directors' false representation as to the reasons for their recommendation of the merger, and (ii) the non-disclosure of the manipulation of the market price of Air Brake stock on April 19 to defeat the Crane exchange offer were material.

The Court of Appeals applied a different standard of materiality; it defined a material fact as a fact "that would influence the stockholders to act differently if disclosed." 419 F.2d at 803. Applying this definition it held not material both the representation as to the directors' reasons for their merger recommendations, and the non-disclosure of the manipulation.

Holding corporate directors to the strictest duty of full disclosure in matters affecting the integrity or weight of their recommendations to stockholders concerning corporate mergers is of great practical and material significance given the phenomenal growth in recent years of the conglomerates through mergers and takeovers. The Court of Appeals held the Air Brake directors to a lesser duty of disclosure than required by the standard laid down by this Court forty days later in *Auto-Lite*.

We respectfully submit that a writ of certiorari should issue to the Court of Appeals for the Second Circuit vacating that part of the judgment of that court which affirmed the dismissal of the consolidated complaint and remanding the case to that court for further consideration in light of *Mills* v. *Electric Auto-Lite Co.*

(1) *The False Representations in the Air Brake Proxy Statement and Their Significance*

The Air Brake directors asserted in the proxy statement as a basis for their recommendation that the stockholders approve the merger, that the merger "will benefit stockholders of WABCO by providing them, on a favorable basis, interest in new manufacturing and marketing fields in which WABCO is not presently engaged." (Ex. 9, p. 3) Neither here or elsewhere in the proxy statement did Air Brake reveal the true basis upon which the directors' recommendation was premised. It did not reveal management's belief that Air Brake by itself had all of the resources necessary for increasingly profitable growth; that in management's judgment its interest was to remain independent and not merge with any other company, particularly one in the plumbing industry; that it had procured for use in communicating with Air Brake shareholders a report from an independent consultant, whom it regarded as reliable, that a merger of Air Brake into a company in the plumbing business would be adverse to the interest of the Air Brake shareholders because it would deprive them of the greater growth opportunities inherent in an independent Air Brake. On the contrary it represented that merger into Standard would be beneficial to the Air Brake shareholders by reason of the interest they would acquire in "new manufacturing fields", 75% of which were in the plumbing business. No disclosure was made that Standard's '67 earnings apart from Mosler (8% of sales) and a non-recurring extraordinary item declined for the fourth consecutive year.* And finally it did not reveal that the choice of Crane's principal competitor, the largest company in the plumbing business as a merger partner, was to prevent a Crane takeover and to force Crane out of the merged entity.

Directors are privy to inside information about the company's operations and its prospects not known to the public stockholder. The stockholders necessarily must assume that the directors' recommendation for a merger is premised on a reasonable basis and a full understanding and evaluation of all information, inside as well as outside. In making merger recommendations to their stockholders, directors are giving investment advice. The directors' recommendation will inevitably be accorded great weight by the stockholders. *Mills* v. *Electric Auto-Lite Co.,* 403 F.2d 429 (7th Cir. 1968), reversed on question of relief, 390 U.S. 375 (1970); *Norte & Co.* v. *Huffines,* CCH Fed. Sec. L. Rep. ¶ 92,204 (S.D.N.Y. 1968). Under these circumstances, the director must be held to the strictest duty of disclosure. They should be required to set forth, in Dean Shulman's imagery, not simply the "show window, but the entire store." Shulman, *Civil Liability and the Securities Act,* 43 Yale L.J. 227, 242 (1933). Here, the Air Brake directors did just the opposite. The show window, in terms of the purported "benefits" to Air Brake shareholders from a merger into Standard, was prominently displayed, but nothing was said about the rest of the store; that Air Brake's merger partner was picked not because of its viable growth prospects, but because, despite its poor growth prospects and declining earnings, it provided a means, not only of defeating the Crane takeover attempt, but of forcing Crane out of the merged entity. The failure to set forth these facts deprived the Air Brake stockholders of the data necessary to an informed evaluation of the directors' pro-merger recommendation, data essential to the making of an informed investment decision.

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* See p. 6 *supra*.

The proxy statement was materially misleading in another respect. It was never amended as required by Rule 14a-9(a) to inform the Air Brake stockholders that Standard, in concert with Air Brake, had on the scheduled expiration date of the Crane exchange offer inflated the market price of Air Brake shares by selling 120,000 shares and purchasing on the market 170,000 shares of Air Brake stock at a net loss of over one-half million dollars in order to deter tenders of Air Brake shares under Crane's exchange offer. The materiality of these facts is self evident. Indeed, the Circuit Court held that "Standard's secret sales [120,000 shares] to IDS and Dillon Read and its purchasing tactics were facts to which a 'reasonable man would attach importance . . . in determining his choice of action in the transactions in question'," and should therefore have been disclosed under Rule 10b-5. But it did not hold that Rule 14a-9 was violated by the non-disclosure of these facts in the Air Brake proxy statement or an amendment thereto. The Court of Appeals applied different standards of materiality to Crane's 14a-9 claims than to its manipulation claims. A material fact under 14a-9 was one that "would influence the stockholder to act differently if disclosed." A material fact for the purposes of manipulation under 10b-5 was one "to which a reasonable man would attach importance . . . in determining his choice of action."

(2) *The Court of Appeals Decision Is in Conflict With a Later Decision of This Court*

There is a direct conflict between the decision of the Court of Appeals and the decision of this Court in *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375 (January 20, 1970), decided forty days after the decision below. In *Auto-Lite* a merger had been approved at a shareholder's meeting following a proxy statement informing the Auto-Lite shareholders that their board of directors recommended approval of the merger but omitting to state that all of Auto-Lite's directors were under the domination and control of the proposed merger partner. This Court held that it was no defense that the merger terms were in fact fair to the Auto-Lite stockholders, and stated:

> “Where the misstatement or omission in a proxy statement has been shown to be ‘material,’ as it was found to be here, the determination itself indubitably embodies a conclusion *that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote.*[6] This requirement that the defect have a significant *propensity* to affect the voting process is found in the express terms of Rule 14a-9, and it adequately serves the purpose of ensuring that a cause of action cannot be established by proof of a defect so trivial, or so unrelated to the transaction for which approval is sought, that correction of the defect or imposition of liability would not further the interests protected by §14(a).”
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>
> “[6] Cf. List v. Fashion Park, Inc., 340 F.2d 457, 462 (C.A. 2d Cir. 1965); General Time Corp. v. Talley Industries, Inc. * * *.” 396 U.S. at 384. (Emphasis added.)

Whether a misrepresentation “might have been considered important by a reasonable shareholder” is very different from whether a representation “would influence a stockholder’s vote.” “Influence” means to alter, sway, affect or induce. (Webster’s Third New International Dictionary at 1160 (1967)). A material fact, as characterized by the Court of Appeals, is one that would affect the vote of the stockholder. However, this Court in *Auto-Lite* placed a much higher duty on a corporate board by requiring disclosure of all facts that *might have entered* into the hypothetical reasonable shareholder’s deliberations as an important factor.

(3) *A Writ of Certiorari Should Issue Vacating Part of the Court of Appeals' Judgment and Remanding the Case for Consideration in View of Auto-Lite*

The great increase in corporate takeovers in recent years is a phenomena of major economic and social consequence in the country. FTC, *Current Trends in Merger Activity* (Stat. Rpt. No. 6 1970); *Hearings on Mergers & Acquisition Before a Subcomm. of the House Comm. on the Judiciary* (Testimony of SEC Chairman Budge 5/14/70); FTC, *Economic Report on Corporate Mergers* pt. 8a (1969).* Directors' recommendations to their stockholders as to how to vote are of critical and often decisive importance in corporate takeover contests. There must be no confusion or uncertainty as to the scope of a director's duty to disclose the basis of and the considerations pertinent to his recommendations in such contests.

The confusion as to the standard of materiality is noted in *Tender Offers; The Target Company's Duty of Disclosure* (Krasik, 25 Bus. Lawyer No. 2, January 1970, p. 455, fn. 24 at p. 459). That this confusion persists, despite this Court's decision in *Auto-Lite*, is illustrated by the recent decision in *Abramson v. Nytronics, Inc.*, CCH Fed. Sec. L. Rep. ¶92,637 (S.D.N.Y. 4/3/70), where the court defines material facts as of "such nature that they could normally be expected to lead a reasonable stockholder not to vote in favor of the proposal set forth in the material." (¶92,637 at 98,842) This standard imposes a greater duty of disclosure than required by the "would influence" standard applied below, but a lesser duty of disclosure than required by this Court's decision in *Auto-Lite*.

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* In requesting a study by the FTC, Senator Phillip A. Hart, Chairman of the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee, stated that "[d]uring its hearings on economic concentration the subcommittee has received sufficient evidence to cast a cloud over the long-run viability of many present day mergers." Letter to FTC Chairman Dixon (5/17/68). The necessity of careful shareholder consideration, with full knowledge of all the facts bearing on the desirability of a proposed merger is apparent.

A director, in making recommendations concerning mergers to his stockholders, must be held to the highest and strictest duty to disclose the basis upon which his recommendations in fact rest. Here, the Circuit Court applied a lesser duty of disclosure on directors under 14a-9 than it did under 10b-5. If there is to be a distinction between the duty to disclose under sections 10 and 14 of the Act, certainly the fiduciary duty which directors owe to shareholders mandates a more encompassing duty in proxy solicitation cases. Moreover, both formulations set out by the Court of Appeals in this case imposed a lesser duty of disclosure than that required by this Court's later decision in *Auto-Lite*, for neither require disclosure of a fact that *might* reasonably be considered important.

Accordingly, we respectfully submit that a writ should issue to the Court of Appeals vacating that part of its judgment which affirmed the dismissal of the consolidated complaint and remanding the case for consideration, in light of *Auto-Lite*, of its dismissal of Crane's 14a-9 claims based on (1) the false representations as to the reasons for the merger and (2) the non-disclosure of the manipulation. This action is necessary despite the Court of Appeals having sustained Crane's claim under sections 9 and 10 of the Act for manipulation of the price of Air Brake stock and having remanded the manipulation claim to the District Court for a determination of Crane's remedies arising out of the manipulation. A material misreprepresentation in the Air Brake proxy statement, an "essential link in the accomplishment of"[7] the merger, would increase the probability of divestiture or separation of Air Brake since there would be no need for proof that the manipulation deprived Crane of success in its tender offer.

CONCLUSION

That part of the Court of Appeals' decision which rejects Crane's claims arising out of the Air Brake solicitation of proxies for the merger is in conflict with the later decision of this Court in *Mills* v. *Electric Auto-Lite Co.* in that the Circuit Court imposed a lesser requirement of disclosure on directors recommending the merger than is required by the *Auto-Lite* decision. For the foregoing reasons, a petition for a writ of certiorari should issue vacating that part of the judgment below which affirmed the dismissal of Crane's consolidated complaint and remanding the case to the Court of Appeals for further consideration in light of *Mills* v. *Electric Auto-Lite Co.*

Respectfully submitted,

John W. Castles 3d
Attorney for Petitioner
25 Broadway
New York, N. Y. 10004
(212) 344-8480

June 2, 1970

Lord, Day & Lord
Wendell Davis, Jr.
Roger C. Ravel
Michael J. Murphy
of Counsel

APPENDIX A

Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 435, 436, 437, 438—September Term, 1968.
(Argued March 7, 1969 Decided December 10, 1969.)
Docket Nos. 32569, 32570, 32571, 32572

Crane Company,
Plaintiff-Appellant,

—v.—

Westinghouse Air Brake Company, A. King McCord, Edward J. Janley, Edwin Hodge, Jr., Frank L. Magee, John A. Mayer, G. Albert Showmaker, Eric A. Walker, Lawrence E. Walkley, Jay V. Wilcox and Leslie B. Worthington,
Defendants-Appellees.

Crane Company,
Plaintiff-Appellant,

—v.—

American Standard, Inc. and Blyth & Co.,
Defendants-Appellees.

Before:

Lumbard, *Chief Judge,*
Smith and Kaufman, *Circuit Judges.*

* * * * *

Smith, *Circuit Judge*:

This is an appeal by Crane Company from a decision of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge,* entered June 5, 1968, dismissing, after trial on the merits, Crane's consolidated complaint which was brought to prevent the consummation of the proposed merger of Westinghouse Air Brake Company ("Air Brake") into American Standard, Inc. ("Standard"). We find error in part and reverse and remand for further proceedings consistent with this opinion.

In the first action of the two later consolidated, Crane sought to enjoin appellees from giving effect to proxies solicited by Air Brake from its shareholders in support of a proposed merger of Air Brake into Standard. The suit was founded on claimed misrepresentation of Standard's earnings, and on allegedly false and misleading statements of other facts in violation of sections 10[1] and 14[2] of the Securities Exchange Act of 1934 and Rules 14a-9[3] and 10b-5.[4]

Crane's second action, which was consolidated with the first action for all purposes, was instituted against Standard and Blyth & Company, Inc. ("Blyth") under sections 9,[5] 10 and 14 of the Exchange Act and Rules 10b-6[6] and 10b-5 and Regulation 14A,[7] the proxy rules, alleging that Blyth on Standard's behalf manipulated and rigged the price of Air Brake stock on the New York Stock Exchange at the expense of the merged entity for the purpose of deterring tenders of Air Brake stock under a Crane exchange offer.

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[1] 15 U.S.C. §78j.

[2] 15 U.S.C. §78n.

[3] 17 C.F.R. §240.14a-9.

[4] 17 C.F.R. §240.10b-5.

[5] 15 U.S.C. §78i.

[6] 17 C.F.R. §240.10b-6.

[7] 17 C.F.R. §240.14a-1 et seq.

THE FACTUAL BACKGROUND

Crane first proposed a merger of Crane and Air Brake to the Air Brake management on May 15, 1967. Crane thereafter first began substantial purchases of Air Brake stock on June 15, 1967. This was noticed by Air Brake's management.

On September 27, 1967, Air Brake received from A. T. Kearney & Company, Inc., independent management consultants, a report which concluded that there was no material compatibility of products between the Air Brake and Crane product lines. On November 3, 1967, Air Brake informed Crane that it did not wish to pursue any merger discussion with Crane.

By that time a beneficial owner of nearly 10 percent of Air Brake's outstanding stock, Crane embarked on a systematic program of purchasing Air Brake shares, despite the November 3 rebuff. Air Brake's management, desiring to prevent Crane from obtaining representation on Air Brake's board of directors, on December 7, 1967, changed the Air Brake by-laws to increase the minimum cumulative vote necessary to obtain representation on the board from 9.1 percent to 25 percent.

In mid-December, 1967, Air Brake requested Kearney & Company to analyze Crane's performance. Shortly thereafter, Mr. Devlin, chairman of Blyth & Company, investment bankers and representative of Standard, proposed to A. King McCord, chairman of Air Brake, that Standard would be interested in helping Air Brake resist the Crane take-over attempt. The Kearney report of January 15, 1968, analyzed the profits of both Crane and its largest competitor, Standard, and concluded that the trend of their earnings and profits was similar, and that the plumbing industry was less dynamic than the industry participated in by Air Brake.

On February 20, 1968, Crane filed its 14-B statements with the SEC declaring its intention to solicit proxies to elect directors to the Air Brake board. Air Brake immediately learned of this. On the same day McCord met with several of the Air Brake directors, and discussed the February 19 proposal of Blyth & Company to merge Air Brake into Standard by exchanging Air Brake stock for a Standard security worth approximately $50 per share. Air Brake's stock was then quoted at about $36 per share.

On March 4, 1968, seven of the ten Air Brake directors met in special session and agreed on the merger of Air Brake into Standard, substantially on the terms which McCord had reached in negotiations with representatives of Standard on March 1, 1968. On March 5 Air Brake informed its shareholders of the terms of the agreement and its approval thereof. Air Brake stock rose to $44 on the New York Stock Exchange.

During the week of April 8, 1968, Crane mailed to Air Brake stockholders its offer to exchange Crane stock and debentures totalling $50 in face amount for each share of Air Brake stock, the offer to expire on April 19 at 5:00 p.m., unless extended. During the same week, Air Brake mailed its proxy statement dated April 8 soliciting proxies in favor of the proposed Standard merger. On April 10, Air Brake stock was selling at about $49. During this week, Standard's purchases of Air Brake shares were substantial. On April 19, the day Crane's tender offer was to expire, Standard purchased 170,000 shares of Air Brake on the New York Stock Exchange at an average cost of $49.50 per share, and sold 100,000 shares off the market to Investors Diversified Services ("IDS") and 20,000 shares on the market at a negotiated price to Dillon Read at an average price of $44.50 per share, taking an apparent loss of more than $500,000 on its purchases and sales for the day.

Crane continued to accumulate Air Brake stock. By mid-April, Crane held about 15 percent of Air Brake's stock, 25 percent by the time of trial, and had increased its holdings to about 32 percent by the end of May, 1968.

The special meeting of Air Brake stockholders was convened on May 16, 1968. The proxy count ran heavily in favor of the Air Brake-Standard merger, 2,903,869 to 1,180,298, very few shares of Air Brake not owned by Crane itself being voted against the merger.

The trial in the District Court began on May 21, 1968, and continued for two weeks until June 3. Judge Ryan read his opinion into the record, and the court entered judgment dismissing the consolidated complaint on the merits on June 5, 1968. The merger became effective on June 7, 1968, upon which the former Air Brake stock was converted into shares of a new issue of Standard convertible preferred. Crane's 32 percent stock interest was converted into 740,311 shares of this preferred stock. On June 13, 1968, under threat of a divestiture action to be brought by Standard under the antitrust laws, Crane sold all but 10,000 of its shares of Standard, at a profit of several million dollars, and later disposed of all but 1,000 of the remaining shares.

STANDARD'S STOCK TRANSACTIONS

Crane attacked Standard's transactions in Air Brake stock on two grounds, one as illegal purchases of votes or proxies, the other as market manipulation and fraud in connection with the purchase and sale of securities. The first attack was pressed most vigorously below but was properly disposed of as unsupported in the evidence and is no longer pressed here.

Perhaps because of the pressure of circumstances and the heavy emphasis on the vote buying claim, the court denied relief with no extensive treatment of the market manipulation and fraud claims involving sections 9(a)(2) and 10(b) of the Act. Consideration of these claims in the light of undisputed evidence in the case leads us to a result contrary to that reached by the District Court.

MARKET MANIPULATION AND DECEPTION

While the main thrust of Crane's case below was in support of the claims of deceptive proxy statement and illegal vote buying, it also vigorously attacked Standard's market activities as forbidden manipulation and fraud in connection with the purchase and sale of securities. The record plainly supports this claim that Standard violated sections 9(a)(2) and 10(b) of the Exchange Act.

In the District Court, Crane maintained that Standard had been buying or selling Air Brake stock conditioned upon the granting or reservation of voting rights. The court found this claim unsupported.[8] Although Crane also alleged that Standard manipulated and inflated the market price of Air Brake with a view to frustrating the Crane tender offer, the District Court summarily rejected this claim.[9]

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[8] "I find there is no proof that American Standard has been buying or selling Air Brake stock conditioned upon the granting or reservation of voting rights. The fact that American Standard bought shares of Air Brake in order to vote in favor of the merger and that it sold to persons whom it hoped would vote in favor of the merger either to obtain money to purchase stock or to keep its holdings below a 10 percent control interest does not constitute a purchase of votes independent of the stock to which the votes belong."

[9] "In the same way, assuming American Standard, through Blyth & Company, was actively engaged in acquiring Air Brake stock solely, as I have noted, in order to vote it in favor of the merger, I find nothing illegal about it. This was the very thing that plaintiff Crane was lawfully doing when it made its tender in order to oppose the merger."

The facts surrounding the manipulation of Air Brake stock by Standard are substantially free from dispute. The critical day in the take-over battle was April 19, the day Crane's tender offer for Air Brake stock was to expire. The holders of Air Brake stock could be expected to delay until the last moment in order to make a decision based on the latest market information, i.e., to compare the value of the tender offer, here not more than $50, with the market price on the day the offer was to expire. In fact, 85 percent of the shares tendered to Crane by the 19th were offered on that day. See Schmultz and Kelley, *Cash Take-Over Bids—Defense Tactics,* 23 Bus. Lawyer 115, 124 (1967). On April 19, Air Brake opened at 45¼ on the New York Stock Exchange, giving Crane's tender offer a good prospect of success. The surest way to defeat the Crane offer was to run the price up to $50. The tape did quickly reach $50 on April 19, and Crane's tender offer failed. Crane's claim that this was the result of extraordinary transactions by Standard is supported by the record.

At the close of trading on the 18th, Standard's net accumulation of Air Brake totalled 367,000 shares. Standard had a self-imposed limit of 460,000 shares, or 10 percent of Air Brake's outstanding stock, allegedly to avoid problems of pooling-of-interest accounting treatment and liability under section 16(b) of the Exchange Act. Only 92,600 shares remained to be purchased to reach Standard's self-imposed limit. On Friday, the 19th, Standard proceeded to purchase in a series of transactions, ranging in size from 100 to 9700 shares, a total of 170,200 Air Brake shares, at an average price of $49.08 per share, and a total price of approximately $8.4 million. The net result of this buying was to represent to the public, whose primary source of information is the tape, that there was a great demand for Air Brake at an increased value. It is reasonable to conclude that many Air Brake stockholders who might otherwise have chosen to tender to Crane chose not to do so because their own holdings in Air Brake looked better as the price went up.

The fact was, however, that not only was Standard creating this extraordinary demand for Air Brake stock, but only 50,000 of the 170,000 shares represented an actual increase in Standard's holding in Air Brake. Before the opening of the market on Friday, Mr. Ledbetter of IDS agreed to purchase from Standard 100,000 shares of Air Brake at $44½. This transaction did not affect the dramatic 5 point climb of the "tape" price of Air Brake since Standard made no public announcement of the private sale. The sale to IDS was secret; Standard's telegram to IDS confirming the sale was marked "HIGHLY CONFIDENTIAL." Shortly after the opening Standard sold another 20,000 Air Brake shares to Dillon Read at 44⅞, at the same time that it was buying on the exchange. At the close of trading on Friday the 19th, Standard held a total of 417,000 Air Brake shares. It had sold 120,000 shares at a price of just above $44½, and purchased 170,000 shares at an average price of $49.08, for a net trading loss exceeding one-half million dollars. Standard had "painted the tape" in Air Brake stock. It appears that of the 26,300 shares of Air Brake traded at 50 that day, all but 100 were bought by Standard. This course of conduct was certain to raise the price of Air Brake stock suddenly and dramatically.

Standard's extraordinary buying here, coupled with its large secret sales off the market, inevitably distorted the market picture and deceived public investors, particularly the Air Brake shareholders. The effect of these purchases was to create the appearance of an extraordinary demand for Air Brake stock and a dramatic rise in market price, as a result of which Air Brake shareholders were deterred from tendering to Crane. Concentrated open market bidding in a take-over battle may not in itself violate present laws and regulations, a question we do not decide here. Standard's action here, however, in concealing from the public—and in particular from the Air Brake stockholders—the true situation as to the market it was making in Air Brake stock resulted in violations of sections 9(a)(2) and 10(b) of the Act.

The entire corporate take-over problem, mushrooming in recent years, is properly engaging the attention of the Congress and the Commission. See Schmultz and Kelley, *op. cit. supra* at 115 n. 2. See also Public Law 90-439, §3, 82 Stat. 455 (1968). In the meantime, we must apply to the devices, new and old, used in these battles the protections contained in legislation existing at the dates of the actions in suit.

We must determine the application of sections 9(a)(2) and 10(b) to the relatively new device of the tender offer, rarely used before 1965, and to the methods here used to combat it. See Hayes and Taussig, *Tactics of Cash Take Over Bids*, 45 Harv. Bus. Rev. No. 2 135 (March-April 1967). Manipulative schemes may not be allowed to succeed solely because they are novel. *A. T. Brod & Co.* v. *Perlow*, 375 F.2d 393 (2d Cir. 1967). The Act was designed "[t]o provide for the regulation of securities exchanges and of over the counter markets . . . [and] to prevent inequitable and unfair practices on such exchanges and markets. . . ." 48 Stat. 881; see 15 U.S.C. §78b. As this court emphasized in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 858, 860 (2d Cir. 1968), *cert. denied sub nom. Coates* v. *SEC*, 394 U.S. 976 (1969), the purpose of the Act was to "protect the investing public," to "promote free and open public securities markets" and to "secure fair dealing in the securities markets." These statutory objectives require the granting of relief in this case.

Section 9(a)(2), 15 U.S.C. §78i(a)(2) makes it unlawful:

> To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

Liability for a violation of section 9(a)(2) is provided by section 9(e):

> Any person who wilfully participates in any act or transaction in violation of subsections (a), (b) or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction.

Section 9(a)(2) was considered to be "the very heart of the act" and its purpose was to outlaw every device "used to persuade the public that activity in a security is the reflection of a genuine demand instead of a mirage." 3 Loss, Securities Regulation 1549-50 (2d ed. 1961).

Sections 9(a)(2) and 9(e) contain requirements of both manipulative motive and willfulness. The section does not condemn extensive buying or buying which raises the price of a security in itself. Nor are the requirements of manipulative purpose and willfulness to be interpreted apart from the statute's design to prevent those with a financial interest in a security from manipulating the market therein. The requisite purpose and willfulness is normally inferred from the circumstances of the case: *In the Matter of Halsey, Stuart & Co.*, 30 SEC 106, 123-24 (1949); cf. *United States* v. *Minuse*, 114 F.2d 36 (2d Cir. 1940).

It is clear that Crane was one of the class of persons intended to be protected by the statute against Standard's violation. Standard acted for the "purpose of inducing" sale by Crane. Standard's actions had the intended and inevitable effect of inducing Crane to become a seller within the meaning of section 9(a)(2), for if successful in defeating Crane's tender offer and consummating the Standard merger, antitrust considerations would require sale by Crane of the shares held by Crane or those received in exchange. This placed Crane in a situation comparative to that of the dissenting shareholders in *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (2d Cir. 1967), *cert. denied* 389 U.S. 970 (1968) for here, as there, plaintiff was forced to become "a seller under the Act."

Section 9(a)(2) was aimed at preventing an individual from dominating the market in a stock for the purpose of conducting a one-sided market at an artificial level for its own benefit and to the detriment of the investing public. See Note, *Manipulation of the Stock Markets Under the Securities Laws*, 99 U. Pa. L. Rev. 651 (1951); Note, *Regulation of Stock Market Manipulation*, 56 Yale L.J. 509 (1947). See also the House Report on the Exchange Act:

> To insure to the multitude of investors the maintenance of fair and honest markets, manipulative practices of all kinds on national exchanges are banned. The bill seeks to give to investors markets where prices may be established by the free and honest balancing of in-

> vestment demand with investment supply. . . . [T]he most subtle manipulating device employed in the security markets . . . is the conscious marking up of prices to make investors believe that there is a constantly increasing demand for stocks at higher prices. . . . Legitimate investors desire to buy at as low a price as possible and to sell at as high a price as possible, and honest markets are made by the balancing of investment demand and investment supply.

H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934) at 11.

When a person who has a "substantial, direct pecuniary interest in the success of a proposed offering takes active steps to effect a rise in the market" in the security, we think that a finding of manipulative purpose is prima facie established.[10] Here we have even more than a motive to manipulate joined with the requisite series of transactions. In furtherance of its interest in defeating the Crane tender offer and consummating its own merger with Air Brake, Standard took affirmative steps to conceal from the public its own secret sales off the market at the same time it was dominating trading in Air Brake shares at a price level calculated to deter Air Brake shareholders from tendering to Crane.

Standard's argument that it had only the purpose to acquire shares of Air Brake looking toward control and not to manipulate is unconvincing. Standard's massive buying on April 19, coupled with its concealed sales, was not consistent with the normal desire of an investor "to buy at as low a price as possible." H.R. Rep. No. 1383, *supra*, at 11. Neither Crane nor Standard were normal investors. Standard knew that it could not acquire 120,000 shares of Air Brake on one day's trading for immediate delivery without paying a substantial premium for the stock. In the week prior to April 10, Standard had in fact purchased 16,500 shares at an average price of $43.38 per share. Knowing that running up the price of Air Brake stock on April 19 would discourage acceptance of the Crane offer, Standard's extraordinary purchases and simultaneous sales on April 19 cannot be explained solely by an alleged "purpose" to acquire voting control consistent with the scope and design of section 9(a)(2). Cf. *White & Weld*, 3 SEC 466, 505 (1938).

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[10] 3 LOSS, SECURITIES REGULATION 1552-53 (2d ed. 1961); *Federal Corp.*, 25 SEC 227, 230 (1947); see *SEC v. Torr*, 22 F. Supp. 602 (S.D.N.Y. 1938).

An ordinary investor watching the tape could only conclude that there was a wide-based demand for Air Brake stock and that it would be unprofitable to tender his stock to Crane at that time. See *SEC* v. *Torr, supra* n. 10; *Halsey, Stuart & Co., supra.* Not only did Standard fail to provide Air Brake shareholders with the information that it planned or was in fact purchasing large amounts of Air Brake stock at a price which made the Crane offer look unappealing on the crucial expiration date, but it further distorted their only ready source of market information—the stock tape—by secret private sales off the stock exchange. As Judge Ryan himself put it, "The securities laws are concerned with the facts presented to the stockholders, not with the motives underlying these facts." See *Heit* v. *Weitzen,* 402 F.2d 909, 913 (2d Cir. 1968), *cert. denied* 395 U.S. 903 (1969); *SEC* v. *Texas Gulf Sulphur Co., supra,* at 401 F.2d 861.

From the foregoing, it is also clear that Standard has violated section 10(b) of the Exchange Act, and Rule 10b-5, 17 C.F.R. 240.10b-5, pursuant to section 10(b) of the Exchange Act, provides as follows:

It shall be unlawful for any person, . . . by use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made not misleading, or

(3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Standard's failure to disclose its manipulation operated as a fraud or deceit on Crane in connection with the purchase and sale of securities, creating a right to relief in Crane quite apart from Crane's rights as a forced seller under section 9(a)(2).

The nondisclosure rule is based "in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information. . . . The essence of the Rule is that anyone who, trading for his own account in the securities of a corporation has 'access, directly or indirectly, to information intended to be available only for a corporate purpose . . .' may not take 'advantage of such information knowing it is unavailable to those with whom he is dealing,' i.e., the investing public." *SEC* v. *Texas Gulf Sulphur Co., supra,* at 401 F.2d 848 (citations omitted).

Standard was an "insider" with respect to the trading of Air Brake stock. Standard was acting in concert with the Air Brake management, with whom it was on the verge of consummating a merger. Standard regularly and systematically informed the Air Brake management of its transactions in Air Brake's stock. Finally, Standard was a major stockholder of Air Brake, and its purchases were within its peculiar knowledge and were an integral part of the takeover scheme.

When securities are subject to trading dominated by an insider such as Standard, there is an obligation to disclose material information to the investing public, and this duty gives rise to liability under 10b-5 to third persons who, as a result of the deception practiced upon the public, are prevented from entering into securities transactions with members of the public. When Crane entered the securities market with its tender offer, it was entitled to the Act's protection not only against being deceived itself but also against deception of the investing public designed to prevent the public from entering into securities transactions. See *SEC* v. *Texas Gulf Sulphur Co.,* 258 F. Supp. 262, 279 (S.D.N.Y. 1966) and *supra,* at 401 F.2d 848.

The inherent unfairness and deception practiced by Standard is readily apparent. The proxy regulations do not protect the investing public against all types of manipulative devices. Although information concerning the terms and purposes of the tender offer are provided by the offeror, the "investors' primary yardstick for evaluating the offer is the market performance, past and present, of the security he holds and the one he is offered, if any." BROMBERG, SECURITIES LAWS: FRAUD—SEC RULE 10b-5 §6.1, p. 111 (1969). In the present case, the market information itself was misleading. If Air Brake's stockholders were aware of Standard's plans and actions on April 19, they would have been able to place the trading in perspective and would not have been misled by the superheated trading of Air Brake on the New York Stock Exchange. Standard's extraordinary buying on April 19, coupled with its large secret sales off the market distorted the market picture and deceived the Air Brake stockholders.[11] From the foregoing it is also clear that the undisclosed information was material. Standard's secret sales to IDS and Dillon Read and its purchasing tactics were facts to which a "reasonable man would attach importance . . . in determining his choice of action in the transactions in question." *List* v. *Fashion Park, Inc.*, 340 F.2d 457, 462 (2d Cir. 1965), *cert. denied* 382 U.S. 811 (1965); *SEC* v. *Texas Gulf Sulphur Co., supra*, at 401 F.2d 849-52.

Since the violation in this aspect is not manipulation but failure to disclose the trading scheme, the question arises as to whether Crane is a proper party to raise the issue since it did not rely on the nondisclosure. Although we have held that reliance was necessary under 10b-5, *List* v. *Fashion Park, Inc., supra*, at 340 F.2d 463, reliance is an element of causation which plays little role in nondisclosure cases. As we pointed out in *List*, "the test of 'reliance' is whether 'the misrepresentation is a substantial factor in determining the course of conduct which results in [the plaintiff's] loss.' . . . The reason for this requirement . . . is to certify that the conduct of the defendant actually caused the plaintiff's injury;" since a "basic . . . element of tort law" is "the principle of causation in fact." 340 F.2d at 462, 463. We have held that where the success of a fraud does not require an exercise of violation by the plaintiff, but instead requires an exercise of violation by other persons, there need be no showing that the plaintiff himself relied upon the deception. "What must be shown is that the[illegible]was deception which misled [other] stockholders and that this was in fact the cause of plaintiff's claimed injury." *Vine* v. *Beneficial Finance Co., supra,* at 635. Standard's deception caused injury to Crane. Crane's tender offer could only be successful if its value to investors was attractive in comparison with the indicated value of Air Brake on the New York Stock Exchange. The extent of the damage will have to be determined by the District Court, in fashioning an appropriate remedy, and the burden of proof thereon will be on Crane. It is sufficient that the causation requirement is satisfied here to the extent of imposing liability upon Standard for the consequences of concealing from the public material information relevant to the market value of Air Brake stock in a free market.

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[11] This is not necessarily a double violation of 10b-5—i.e., once in the manipulation and again in its nondisclosure. Standard's transactions were manipulative, and it concealed material information, the violation of 10b-5 consisting of nondisclosure of the manipulation. Compare *Thornton & Co.*, 28 SEC 208, 224 (1948), *aff'd sub nom. Thornton* v. *SEC*, 171 F.2d 702 (2d Cir. 1948); *Adams & Co.*, 33 SEC 444 (1952); *Surowitz* v. *Hilton Hotels*, 342 F.2d 596 (7 Cir. 1965), *rev'd and remanded* 383 U.S. 363 (1966).

The standing issue arises in another context with respect to the purchaser-seller limitation, which arises from the language of both section 9(a)(2) and Rule 10b-5. Section 9(a)(2) prohibits manipulation "for the purpose of inducing the purchase or sale of such security by others," while Rule 10b-5 similarly prohibits deception upon "any person in connection with the purchase or sale of any security."

Although this court adhered to a fairly strict construction of the purchaser-seller requirement in *Birnbaum* v. *Newport Steel Corp.,* 193 F.2d 461 (2d Cir.), *cert. denied* 343 U.S. 956 (1952), and in *Iroquois Industries* v. *Syracuse China Corp.,* —— F.2d —— (2d Cir. Nov. 3, 1969), there was in *Birnbaum* no indication of a causal connection between the alleged violation of Rule 10b-5 and the injury to the corporation and its shareholders. The requirement has been interpreted fairly broadly in cases since *Birnbaum*. In *Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F.2d 540 (2d Cir. 1967), we held that shareholders of a corporation had standing under Rule 10b-5 to obtain injunctive relief to prevent controlling persons from depressing the price of the corporation's stock by market manipulation, even though the complaining shareholders had purchased their shares prior to the manipulation and had not yet sold them. The damage claim was dismissed for lack of a causal connection, *id.* at 547. See *General Time Corp.* v. *Talley Industries, Inc.*, 403 F.2d 159 (2d Cir. 1968), *cert. denied* 393 U.S. 1026 (1969); *SEC* v. *General Time Corp.*, —— F.2d —— (2d Cir., Nov. 19, 1968) (slip op. p. 347), *cert. denied* 393 U.S. 1026 (1969). In damage actions, this court in *Symington Wayne Corp.* v. *Dresser Industries*, 383 F.2d 840, 842 (2d Cir. 1967), referred to the decisions in *A. T. Brod & Co.* v. *Perlow*, *supra*, and *Vine* v. *Beneficial Finance Co.*, *supra*, as having "expressly left undecided the question whether one who is neither a purchaser nor a seller can attack a transaction under Rule 10b-5."[12] *Iroquois* declined to allow relief in a tender offer situation where plaintiff was neither a purchaser nor a seller.

The present case falls within the rationale of *Vine*, where we held that a minority shareholder in a short form merger is a "seller" since he is entitled only to cash for his shares. See also *Dasho* v. *Susquehanna*, 380 F.2d 262 (7 Cir.), *cert.*

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[12] See *Opper* v. *Hancock Securities Corp.*, 367 F.2d 157 (2d Cir. 1967), *aff'g* 250 F. Supp. 668 (S.D.N.Y. 1966); *Commerce Reporting Co.* v. *Puretec, Inc.*, 290 F. Supp. 715 (S.D.N.Y. 1968); *Stockwell* v. *Reynolds & Co.*, 252 F. Supp. 215 (S.D.N.Y. 1965); *Voege* v. *American Sumatra Tobacco Corp.*, 241 F. Supp. 369 (D. Del. 1965).

denied 389 U.S. 977 (1967). The effect of Standard's deception and manipulation was to deter Air Brake shareholders from tendering to Crane. The success of Standard's maneuver made Crane a forced seller of the newly issued Standard convertible preferred under threat of a divestiture action to be brought by Standard under the antitrust laws.[13] Thus, we have here in Crane one induced to sell by Standard's deception and manipulation and so within the protection of section 9(a)(2). Moreover, even if a narrower view were taken of section 9(a)(2), it would seem that Standard's conduct would still be actionable under Rule 10b-5(c), condemning conduct which operates as a fraud or deceit "upon any person."

The purchase-sale requirement must be interpreted so that the broad design of the Exchange Act, to prevent inequitable and unfair practices on securities exchanges and over-the-counter markets, is not frustrated by the use of novel or atypical transactions. *A. T. Brod & Co.* v. *Perlow, supra,* 375 F.2d at 397. "In determining who has standing to enforce duties created by statute, a court's quest must be for what will best accomplish the purposes of the legislature." *Electronic Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 946 (2d Cir. 1969). The purpose of Congress in enacting sections 9(a)(2) and 10(b) was to protect the investing public from manipulation and deception by the use of devices which defrauded or misled investors in securities transactions.[14]

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[13] The same might be said of the Air Brake stockholders who, after the merger were faced with the cancellation of Air Brake common stock, and whose alternatives were to exchange their Air Brake shares for the new preferred, or to enforce their appraisal rights as dissenting shareholders.

[14] Congress when it used the phrase "in connection with the purchase or sale of any security" intended only that the device employed, whatever

We find violation of both section 9(a)(2) and Rule 10b-5 and standing in Crane to raise the issue. The amendment to the Act adding section 14(e) (15 U.S.C. §78n(e))[15] effective July 29, 1968, subsequent to the events here in question, should serve to resolve any doubts about standing in the tender offer cases, even where an offeror is not, as is Crane, in the position of a forced seller.

THE AIR BRAKE PROXY STATEMENT

We turn now to the Air Brake proxy statement. Crane's principal contention is that the proxy statement misrepresents Standard's 1967 operating earnings and net income.

Rule 14a-9 of the Securities and Exchange Commission, 17 C.F.R. §240.14a-9, provides that no proxy solicitation shall be made which under all the circumstances "is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading. . . ." Viola-

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it might be, be of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities.

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Therefore, when materially misleading corporate statements or deceptive insider activities have been uncovered, the courts, as they should, have broadly construed the statutory phrase "in connection with the purchase or sale of any security." *SEC* v. *Texas Gulf Sulphur Co.*, *supra*, 401 F.2d at 860-61. See *Heit* v. *Weitzen*, *supra*, 402 F.2d at 913 (2d Cir. 1968).

[15] 15 U.S.C. §78n(e) provides:

> "It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation."

tions of the proxy rules give rise to a private right of action under section 27. *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964). Also applicable here is Rule 10b-5, which encompasses a similar concept of fraud. *SEC* v. *National Securities,* 393 U.S. 453, 466-469, 89 S. Ct. 564, 573 (1969). We do not separately discuss the scope of Rule 10b-5's general impact on fraud and material omission in proxy statements in view of our holding here that there was no violation of the detailed proxy rules.[16]

For liability to attach under Rule 14a-9 there must be a false or misleading statement, and it must be material.[17] Rule 3-02 of Regulation S-X. The representation must be one that would influence the stockholder's vote.[18] See JENNINGS & MARSH, SECURITIES REGULATION 964-1003 (2d ed. 1968); 2 LOSS, SECURITIES REGULATION 917-18 (2d ed. 1961); Soward & Mofsky, *Federal Proxy Regulation: Recent Extensions of Control,* 41 St. John's L. Rev. 165 (1966). To the extent that the District Court rejected Crane's allegations as a matter of fact, the issue on appeal is whether on the record as a whole these findings are clearly erroneous. Fed. R. Civ. P. 52(a); *United States* v. *U. S. Gypsum Co.,* 333 U.S. 364 (1948); cf. *Comstock* v. *Group of Investors,* 163 F.2d 350, 357 (8 Cir. 1947), *aff'd* 335 U.S. 211 (1948).

Crane asserts that Standard's foreign results were incorrectly presented by the statement in the proxy: "Foreign results improved in 1967, after a two-year decline." The proxy statement indicates that foreign results improved by $857,000 over 1966. Crane does not dispute that there was some improvement in Standard's foreign results. It contends, however, that $726,000 of this improvement resulted from the inclusion, for the first time, in the 1967 consolidated statement of the operations of the Brazilian subsidiary, $426,000 of which are attributable to the earnings of that subsidiary prior to 1967. Although Rule 4.04(b) of Regulation S-X requires specific mention of the inclusion in a consolidated statement of the earnings of a subsidiary not similarly included in the previous statement,[19] the rule is not dispositive here. Standard had consistently followed the practice of consolidating all foreign subsidiaries in a comparable status to the Brazilian subsidiary in 1967, and there was a determination by independent public accountants that the Brazilian subsidiary's operations were not of such materiality in the overall consolidated results of operations, over $13,350,000 net income, as to warrant specific mention. The District Court found that the method used by Standard was according to generally accepted accounting procedures and presented a true financial picture. This finding is a recognition of the fact that full disclosure does not require the inclusion in a proxy statement of every relevant detail of a company's operation. While mention in the statement would have pointed out the true situation more accurately, we recognize that the requirement of materiality is a matter to be determined upon all of the relevant facts and circumstances, *Richland* v. *Crandall*, *supra* n. 17, Rule 3-02 of Regulation S-X,[20] and we find no error in the court's finding that the accountant's treatment was proper here.

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[16] See *Miller* v. *Steinbach,* 268 F. Supp. 255, 278-79 (S.D.N.Y. 1967); *Simon* v. *New Haven Board & Carton Co.,* 250 F. Supp. 297 (D. Conn. 1966); *Barnett* v. *Anaconda Co.,* 238 F. Supp. 766, 776 (S.D.N.Y. 1965).

[17] *Richland* v. *Crandall,* 262 F. Supp. 538 (S.D.N.Y. 1967).

[18] *Miller* v. *Steinbach, supra* n. 16; *Dunn* v. *Decca Records, Inc.,* 120 F. Supp. 1 (S.D.N.Y. 1954); *Kaiser-Frazer Corp.* v. *Otis & Co.,* 195 F.2d 838 (2d Cir. 1952), *cert. denied* 344 U.S. 856 (1952) (material exaggeration of earnings trend).

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[19] 4.04(b) As to each consolidated statement and as to each group statement of unconsolidated subsidiaries, a statement shall be made as to whether there have been included or excluded any persons not similarly treated in the corresponding statement for the preceding fiscal period filed with the Commission. If the answer to the foregoing is in the affirmative, the names of such persons shall be given.

Crane also challenges the following statement in the proxy relating to Standard's 1967 U. S. results:

> Income improved moderately in the latter half of 1967 due to improvements in housing construction but the increase in earnings was mainly due to the inclusion of the Mosler Safe Company's operations since date of acquisition in May 1967. Mosler sales since acquisition in 1967 amounted to $51,249,000.

Crane asserts that this statement is misleading because there was no increase apart from Mosler, and the statement erroneously gives the impression that Standard's 1967 domestic earnings apart from Mosler improved over 1966, whereas in fact they declined by $1,055,000. While the statement might have been better phrased than by the use of the words "mainly due," it does convey a sufficiently accurate picture of Standard's American operations so as not to mislead. The proxy statement does not claim that each and every phase of the operations of Standard improved in 1967. The statement explicitly says that income declined during the first half of 1967 and reports a modest improvement in the second half due to the inclusion of Mosler's operations in the second half. Such inclusion of the operations of a consolidated subsidiary is accepted accounting practice. SEC Regulation S-X, Rule 4-02. The benefit obtained through the acquisition was a part of Standard's true picture for 1967.

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[20] If the amount which would otherwise be required to be shown with respect to any item is not material, it need not be separately set forth in the manner prescribed.

Crane further maintains that 1967 earnings were overstated by 25 percent by failing to charge foreign currency losses of $3,333,000 against income, citing Rule 3-09 of Regulation S-X. This claim is not well taken. The $3,333,000 item was an unrealized loss which had not yet been taken by conversion of the foreign currencies into U. S. dollars. The facts as to the unrealized 1967 foreign exchange loss were fully disclosed in the proxy statement. The amount of the loss was stated and the account to which it was charged was specified.[21] The loss was charged against a reserve which had been specifically set up to absorb such losses and gains, a method of accounting which had been followed by Standard since 1959. There was testimony by Standard's accountants and experts that the reserve was properly created in accordance with generally accepted accounting principles to cover the unrealized effects of foreign currency valuations. The District Court accepted this testimony as against appellant's claims.[22] Crane has not established that this finding was clearly erroneous.

Crane's contention that the Accounting Principles Board Opinion No. 9 requires a different result is not sustain-able.[23] The opinion does indicate a concern that such losses pass through the income statement for the applicable year. Such a concern with reflecting the results of operations of a corporation during a particular period of time does not require departure from Standard's method here, where the losses were unrealized, a reserve had long before been created from the results of past earnings, the treatment had been consistent for many years, and there was expert opinion testimony that there is no principle of accounting which requires any other treatment in light of the particular reserve created. This is not a situation where a company utilized the reserve to mislead, reporting favorable items in the income statement and unfavorable items as direct charges to earned surplus without adequate comment elsewhere. Crane's contention that the 1967 earnings were misleading regardless of compliance with generally accepted accounting principles cannot be sustained. If the deviation was not properly an item of profit or loss in 1967, there was no material exaggeration of the trend of Standard's earnings. Compare *Kaiser-Frazer Corp.* v. *Otis & Co., supra* n. 18. Since the facts as to the unrealized 1967 foreign exchange loss were adequately discussed in the proxy statement, there is not here any misstatement or omission which would influence the stockholder's vote. See *Miller* v. *Steinbach, supra,* n. 16.

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[21] Note 1 to the consolidated statement is as follows:

> The financial statements of the consolidated foreign subsidiaries have been converted to U. S. dollars at year-end rates of exchange. . . . Unrealized exchange losses principally in England and Brazil aggregating $3,333,000 in 1967 were charged to the Reserve for Foreign Operations.

[22] "I find the plaintiff's expert testimony did not refute this by a fair preponderance of the evidence. The best that emerged from all the testimony on the subject seemed to be that the accounting profession is desirous of establishing uniformity in reporting such losses or gains, at least to stockholders, and that they advocate that these losses be taken against and gains credited to income rather than to a reserve as reflecting a truer picture."

Crane's second charge against the proxy statement is that Air Brake's management falsely stated to the shareholders its reasons for recommending the merger and falsely stated that careful consideration had been given to the merger. See *SEC* v. *Okin*, 137 F.2d 862 (2d Cir. 1943). The "due consideration" claim stems from the following statement in the letter of transmittal attached to the face of the proxy:

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[23] Compare, *Norte & Co.* v. *Huffines*, 288 F. Supp. 855 (S.D.N.Y. 1968).

> The number of shares of American-Standard to be received by WABCO shareholders upon the merger, the provisions of those shares, and all other terms and provisions of the merger were agreed to by the two companies after careful consideration of, among other things, the earnings, market prices and book values of the respective stocks, and the dividend and conversion privileges of the American Standard stock to be issued to the WABCO shareholders.

As to this claim, the District Court found as follows:

> The evidence discloses that the proxy statement approved by the Commission gives evidence of much thought, as do the extraordinary pre-solicitation letters of McCord to the stockholders. . . . [B]eginning the middle of July, 1967, Air Brake secured and obtained and acted upon the advice of its accountants, house counsel and general counsel and the advice of a proxy solicitation public relations firm and were preparing to resist the attempts of Crane to force a merger of Air Brake with Crane. Each step taken by Crane and each step taken by Air Brake was carefully thought out and planned. The stakes were high and their steps were measured and weighed before they were taken. . . . Suffice it to say that there has been no hint and no evidence of any improper motives. Certainly the prevention of a takeover of the company is not actionable unless the law has been violated and I find no federal statute or rule has been violated.

The finding of "due consideration" is supported by the record. McCord testified that as early as December 1967 he received a preliminary inquiry from Standard's president concerning the possibility of a merger. McCord met with Air Brake's board of directors on January 22 and February 7, 1968, at which meetings the desirability of merger talks with several companies was discussed. The board specifically authorized McCord to proceed with detailed studies of the consequences of a merger with Standard, or alternative companies, and at the February 7 meeting the board authorized McCord to determine what value Standard would place on Air Brake shares in the event of an exchange offer. On February 19 Standard made its first suggestions as to possible terms of merger. McCord met with three of Air Brake's ten directors the following day. At that meeting Mayer produced charts detailing Standard's markets, sales records and profit margins, accompanied by Mayer's comments that Standard was not in any more attractive line of business than Crane. This had been confirmed by the Kearney report of January 15, reference to which was omitted in the discussion. Nonetheless, the directors were impressed with the high valuation offered for Air Brake stock, $50 per share, and authorized McCord to negotiate the merger. Finally on March 4, the Air Brake board reviewed the provisions of the preliminary merger agreement in detail. A report prepared by the financial vice-president of Air Brake was distributed to each director, as was a general statement written by McCord. McCord reported to the board that he had discussed Standard's operating program with Standard's president, Mr. Eberle, and that Standard had generally reached their objectives. The board discussed such subjects as the proposed conversion ratio, the market price of Standard stock, Standard's price-earnings ratio, the opportunity to increase the profitability of Standard, and the future earnings of Air Brake stockholders.

The facts emphasized by Crane do not compel a different conclusion. Crane argues that the effect of the merger would be to increase the concentration of Air Brake's shareholders' investment in plumbing and heating supplies. The proxy statement, however, did not represent that the merger would result in greater percent-sales-per-product-line diversification. It only stated that the board "believes that the merger . . . [will provide Air Brake shareholders with] interests in new manufacturing and marketing fields in which WABCO is not presently engaged."[24] Crane's further argument is that the board on March 4 had no advance preparation for the hastily called meeting of seven of the ten directors, and those present exercised no independent judgment but merely relied on McCord's representations. McCord himself admitted that he did not point out at the meeting that the report prepared by Eberle indicated that Standard's net income for 1967 was about $5,000,000 less than planned. Nonetheless, such allegations fall far short of a deception practiced upon the corporation or a failure to exercise the care required of the directors as fiduciaries.[25] The circumstances surrounding the merger negotiations do not indicate that the directors were without a reasonable basis in fact for their recommendation. See Leavell, *Investment Advice and the Fraud Rules*, 65 Mich. L. Rev. 1569 (1967); *SEC* v. *Okin, supra.*

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[24] The full text reads as follows:

> Your Board of Directors believes that the merger with American-Standard will benefit shareholders of WABCO by providing them, on a favorable basis, interest in new manufacturing and marketing fields in which WABCO is not presently engaged. American-Standard is an international producer of building products, industrial and technical products, and bank, security and office systems. Upon the joinder of those businesses with WABCO operations, the resulting company will have an established position in the industrial world in the combined, broader based lines of business under competent management; will have available greater resources for expansion and research and will have more diversified sources of business and income. It is believed that these conditions should enhance the value of the holdings of shareholders of WABCO and the dividends on their shares to a greater extent than could be achieved by WABCO alone.

Crane also argues that the proxy statement falsely states the basis for the recommendation, and fails to disclose that the recommendation was a product of an unjustified design to prevent Crane from acquiring control. Crane points to statements by McCord that he concluded on January 3 that it was Air Brake's interest to remain independent, but by February 20 he had come to the conclusion that if necessary to prevent a takeover, Air Brake should merge with another company. McCord, however, also stated that a takeover of Air Brake by Crane would have a marked effect on the business and management of Air Brake since the Crane management was not the equal of Air Brake's.

The District Court found that there were no improper motives underlying the action of the Air Brake directors. Moreover, it is sufficient that the relevant facts were fairly stated in the proxy statement.[26] The proxy statement clearly pointed out that the board of directors opposed the Crane takeover, and that certain Air Brake personnel would be employed with Standard after the merger.[27] Crane

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[25] Compare, *Ruckle* v. *Roto American Corp.*, 339 F.2d 24 (2d Cir. 1964); *O'Neill* v. *Maytag*, 339 F.2d 764 (2d Cir. 1964); *SEC* v. *Texas Gulf Sulphur Co., supra* at 401 F.2d 833 (2d Cir. 1968); cf. *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963).

[26] See *Doyle* v. *Milton*, 73 F. Supp. 281, 285-86 (S.D.N.Y. 1947); *Laurensano* v. *Einbender*, 264 F. Supp. 356 (E.D.N.Y. 1966).

[27] "Crane Company is making an offer to exchange your WABCO shares for subordinated debentures of Crane Company. This represents the latest step by Crane in its campaign to take over control of your company. We must make certain points very clear:

(continued on following page)

has not shown that the proxy statement under all the circumstances is false or misleading with respect to any material fact, i.e., a fact that would influence the stockholders to act differently if disclosed. We agree with the District Court that the directors did not breach their duty of disclosure with regard to the proxy statement.

We affirm the District Court's dismissal of the claim as to the Air Brake proxy statement; we reverse the judgment below dismissing the claim based upon market manipulation and deception, and remand for a further determination in the District Court of the appropriate remedies. Without limitation, these remedies may include damages, if any, prospective injunctive relief, as well as appropriate retrospective relief, notwithstanding the consummation of the merger. See *J. I. Case Co. v. Borak, supra.* The manipulation may be found to have deprived Crane of success in its tender offer in the free market to which it was entitled, in which case divestiture or separation of Air Brake may be required. Consummation of the transaction cannot be allowed to preclude any relief for violations of the securities laws.

We do not suggest that such a drastic result as divestiture or separation must necessarily be reached in this case.

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(1) This offer was not negotiated with your management.

(2) If you tender your shares to Crane, you are irrevocably bound. You may not withdraw your shares if you change your mind or wish to sell. In contrast you may vote the enclosed proxy for the American-Standard merger and are still free to revoke your proxy or sell your shares or accept Crane's offer.

* * * * *

It is contemplated that the business conducted by WABCO prior to the consummation of the merger will be continued thereafter by the present personnel of WABCO in a new wholly-owned subsidiary of American-Standard which will be named Westinghouse Air Brake Company."

Crane must establish that any relief sought is equitably required, considering the effect on other shareholders and the diligence with which Crane sought to prevent consummation of the merger and to obtain delay in its implementation pending expeditious review of the denial of injunctive relief by the trial court. See discussion in *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 947-48 (2d Cir. 1969).

APPENDIX B

Opinion of the District Court

Crane Co. v. American Standard Inc., et al.

United States District Court, Southern District of New York. 68 Civ. 1845. June 5, 1968. Opinion of the court in full text.

Ryan, District Judge: Gentlemen, I am prepared to dictate my decision upon the record. It is a decision hurriedly prepared from the notes that I made during the trial and the notes that I made as I read the depositions which were received in evidence. I dictate it now on the record because I know the urgency of the entire situation and of the desire of the plaintiff to take immediate steps as it may deem advisable, or may desire for the protection of its rights. I think the best way and the most expeditious way of putting the matter in position for immediate appellate review is by deciding the case right now, and I am prepared to do so.

[*Background*]

The actions which are now consolidated and before the Court were filed against defendants to obtain a declaration that certain proxies for the voting of certain shares of Air Brake stock, procured by defendants and others acting in concert with these defendants, are null and void.

The consolidated complaint seeks to enjoin defendants from voting these proxies and from giving effect to any merger between Air Brake and American Standard.

On March 5, 1968, by a letter to its stockholders, Air Brake announced that its directors had, after careful consideration, agreed with American Standard to merge Air Brake into American Standard, upon the approval of the stockholders of both companies at meetings of their respective stockholders which were to be held and had been scheduled for May 16, 1968.

Air Brake was organized under Pennsylvania law and approval by a majority of its outstanding voting stock is required to effectuate any merger.

Crane, the plaintiff, itself desirous of merging with Air Brake and of obtaining representation on its board, had begun to purchase stock of Air Brake in June, 1967, and by December, 1967, Crane had almost a 10 per cent interest in Air Brake which was then sufficient to insure the election of one director.

However, on December 7, 1967, Air Brake changed its by-laws to require, in effect, that a 25 per cent interest was necessary to elect one director. Crane has continued to acquire shares of Air Brake since June, 1967, and at the time of the trial, when the trial began, had over 25 per cent interest in Air Brake, and these holdings increased and continued to May 28, 1968. There is in evidence a detailed statement of Crane's acquisitions and holdings; as of April 2, 1968, Crane owned 672,100 shares of Air Brake stock, and from that date to May 2, 1968, Crane acquired an additional 531,285 shares.

[*Complaint*]

We now turn to examine the complaint, as it has been consolidated. The first two counts of the consolidated complaint are directed primarily against Air Brake, and the third count is directed primarily against American Standard and the brokerage firm of Blyth & Company who acted as American Standard's broker.

[*Exchange Act Claims*]

The first count brought individually and on behalf of Crane, and derivatively on behalf of Air Brake, alleges that the Air Brake proxy statement dated April 18, 1968, violated Section 10(b) and 14(a) of the Securities Exchange Act of 1934 (15 U. S. C. Sections 78i(b) and 78n(a), and Regulation 14(a) and Rule 10(b)(5) because it omits three facts, it alleges, which should have been included in the proxy statement and were omitted, which are:

(1) That the purpose of the Air Brake-Standard merger was to avoid a takeover of Air Brake by Crane;

(2) That Crane and Standard are substantial competitors; and

(3) That Air Brake had received a letter from the Department of Justice inquiring about the proposed merger with Standard and takeover efforts of Crane.

Now, we should note at this stage—I do note and I find—that the proxies and votes in question here relate to the annual and special meetings of the stockholders of Air Brake which were scheduled for May 16, 1968, and that among the matters which were to be voted upon and were noticed to be voted upon are the election of directors of Air Brake and a proposed merger of Air Brake with American Standard. Crane has nominated three candidates for directorship and has filed appropriate forms with the SEC for the solicitation of Air Brake stockholders. Neither Blyth nor American Standard has filed such registration, nor have they filled out such forms which are required, if they are soliciting stock proxies and votes. Crane has opposed the merger with American Standard and has made a tender offer to Air Brake stockholders offering to buy Air Brake stock.

[*Section 10(b) Violation Charged*]

We return now to the complaint. We come then to the second count of the complaint. Here it is pleaded individually on behalf of Crane that the omissions in the Air Brake proxy statement constitute a violation of Section 10(b) of the 1934 Act and of Rule 10(b)(5) promulgated thereunder.

The Court at pre-trial hearings held on May 8, 1968, propounded certain interrogatories to the plaintiff. The plaintiff, by its answers to these interrogatories, which were served on May 11, 1968, stated that Air Brake's proxy solicitations violated "Section 14(a)(9) of the Act for the additional reasons that (1) the letters from A. King McCord, Air Brake's chairman, to Air Brake's shareholders dated December 13, 1967, December 16, 1967, and March 5, 1968, were false and misleading, and (2) Air Brake's proxy statement was misleading with respect to American Standard's 1967 income, with reference to the possibility that American Standard would sell as well as purchase American stock in the market and that the pro forma statement of the capital assets of the combined companies, as stated, were false and misleading.

[*Other Violations*]

The third count of the consolidated complaint charges that American Standard and its agent Blyth & Company violated Rules 14(a)(3), and 11 of the Proxy Rules and Sections 9, and 10(b) of the Securities Exchange Act of 1934.

It also charges violation of the statutes of the Commonwealth of Pennsylvania and of the common law in the following ways. These ways are stated to be by solicitation by Air Brake of proxies for use at the Annual Meeting of Air Brake without having filed the information specified in Schedule 14B of the proxy rules, and by directly soliciting proxies without having filed the information specified in Schedule 14B of the Proxy Rules and without having furnished to the persons solicited a proxy statement; and by purchasing proxies and votes of stockholders of Air Brake which is alleged to be an act in violation of the laws of Pennsylvania.

It continues with these further specifications of violation of the law, and it alleges, in substance, that American Standard violated the rules, the proxy rules and the applicable federal law, by failing to disclose in the proxy statement that had been filed by Air Brake, that they had violated or would violate State law by purchasing proxies and votes from stockholders of Air Brake and by stating in the proxy statement that American Standard would purchase shares of Air Brake and omitting to state that it would purchase thousands of such shares at a premium and sell or dispose of thousands of such shares at a discount and purchase proxies and votes—thereby illegally incurring substantial expenses which would, if the merger of American Standard and Air Brake for which the said proxies and the votes were solicited and bought is approved, be borne largely by Air Brake's present stockholders, all in violation of Proxy Rule 14a-9.

[*Manipulations*]

This count in the complaint further alleges that the defendants, by manipulating and inflating the market price of Air Brake with a view to frustrating and impeding the outstanding tender offer of Crane under which Crane sought to acquire all the stock of Air Brake, and by not revealing these facts in the proxy statement concealed material facts from the stockholders of Air Brake, all in violation of Sections 9, 10b and 14 of the Act.

[*Specific Violations*]

The violations by American Standard and Blyth Company, according to Crane, took the following form. They are detailed and specified by Crane as follows:

American Standard and Blyth systematically purchased shares of Air Brake from arbitrageurs of Air Brake which shares would normally flow to Crane in response to its offer. This was a purchase from Beer, Stearns & Company in which American Standard used its own funds. American Standard and Blyth, in order to secure immediate delivery prior to record date, are charged with having paid above the market price, and it is charged that American Standard sold shares of Air Brake to purchasers who committed themselves to vote in favor of the merger and that sales were made below the market price because the purchaser gave up its voting rights as requested by American Standard, or because delivery date was delayed beyond the record voting date.

These sales, it is charged, had been made to IDS of 100,000 shares; to Dillon Read & Company of 20,000 shares; and to Goldman, Sachs & Company of 35,000 shares. In addition, it is charged by Crane that Blyth & Company participated on behalf of American Standard in a sale by a Pittsburgh bank to Salomon Bros. & Hutzler on similar conditions. Because American Standard was engaged in concurrent purchases and sales of Air Brake stock, plaintiff charges that it was engaged in nothing more than the buying and selling of votes and in transactions and that this was an expensive proposition to stockholders of Air Brake, American Standard and, therefore, to the proposed merged corporation, and that this activity caused an artificially high price in the Air Brake stock which was available to Air Brake stockholders if they sold to American Standard rather than to Crane.

Urging that the failure to disclose these activities in the proxy statement was an omission of great materiality to the stockholders of Air Brake, plaintiff would void the entire proxy statement issued and thus invalidate the entire vote cast at the special meeting of Air Brake.

We pause here to note that on May 16, 1968, American Standard was the beneficial owner of 459,622 shares of Air Brake stock which, of course, was voted in favor of the merger.

[*Complaint Dismissed*]

I find from the evidence that plaintiff has failed to sustain its burden of proof and I conclude that the consolidated complaint must be dismissed and judgment be entered for all defendants on the merits.

[*No Arrangement with Broker-Dealer*]

I first consider the claim against Blyth & Company. There was an absolute failure of proof to support the charge that Blyth & Company was engaged in soliciting proxies on behalf of American Standard. The Chairman of the Board testified that it had a blanket order from American Standard to purchase and sell Air Brake stock.

on its behalf at the best price, the only limitation being that American Standard did not at any time own more than 10 per cent of the Air Brake stock. There was no evidence that there was any arrangement whereby the purchaser of the stock from Blyth & Company at its request committed itself to voting its stock in a certain way. But even if there had been, this would not constitute solicitation of votes by either American Standard or Blyth in its behalf, nor would it be in violation of federal statute or rule with which this Court is alone concerned.

[*No Proof of Conditional Buying and Selling of Shares*]

I next consider the claim against American Standard. I find there is no proof that American Standard had been buying or selling Air Brake stock conditioned upon the granting or reservation of voting rights. The fact that American Standard bought shares of Air Brake in order to vote in favor of the merger and that it sold to persons whom it hoped would vote in favor of the merger either to obtain money to purchase stock or to keep its holding below a 10 per cent control interest does not constitute a purchase of votes independent of the stock to which the votes belong.

[*Registration for Solicitation of Proxies*]

Plaintiff cites Rule 14a-11 of the Proxy Rules in support of its charge that American Standard failed to register as a solicitor of proxies. This rule by its very language applies only to a solicitation with respect to the election or removal of directors for the purpose of opposing a solicitation. The proxies were for a vote on a proposed merger;

they were not sought in connection with the election of directors of Air Brake and there was no opposition solicitation by American Standard within the rule cited. Neither was there proof that American Standard was participating in a solicitation.

Plaintiff's argument that the merger was nothing more than a step to retain in control the directors of Air Brake and that the solicitation was in reality one for the election of directors is based upon an unsupported conclusion as to defendants' motives with which this Court is not concerned.

Even if American Standard, while it was the record owner of stock and at the time it sold the stock, has requested the purchaser to vote the stock a certain way, there would have been illegal solicitation, for, as the owner of its stock, it had absolute control over the voting of that stock.

However, at no time did American Standard sell stock without the accompanying vote. But, even if it had, this would not have constituted a solicitation for purposes of federal regulation.

In the same way, assuming American Standard, through Blyth & Company, was actively engaged in acquiring Air Brake stock solely, as I have noted, in order to vote it in favor of the merger, I find nothing illegal about it. This was the very thing that plaintiff Crane was lawfully doing when it made its tender in order to oppose the merger.

Since American Standard was not engaged in soliciting proxies, there was no omission of a material fact in the proxy statement of Air Brake. The charge of falsity predicated on this third count has not been established.

[*Frustration of Takeover Bid*]

I come to the charges of falsity in the proxy statement made against Air Brake. It is charged, first, that the Air Brake management failed to disclose that one of the reasons, if not the sole reason, for Air Brake's recommendation of the American Standard merger was to forestall Crane from acquiring control of Air Brake and to insure the continuance of Air Brake's present management.

The defendant Air Brake has denied that this was the reason for the recommendation, and plaintiff has failed to establish its contention to the contrary. This assumes that this was a material fact disclosure which is required under Section 10B or Section 14A. I do not find that this is so. The securities laws are concerned with the facts presented to the stockholders, not with the motives underlying these facts.

As was observed in *Laurenzan* v. *Einbenbender,* 264 F. Supp. 356, Section 14(a)(e) "exacts candor of disclosure, not fairness of substantive terms."

But, more significant is the fact that the attempted takeover by Crane as well as the fact that Air Brake's personnel would continue to be employed after the merger was clearly set forth in the proxy statement.

Thus, on page 2 of Mr. McCord's letter to stockholders of Air Brake, which letter enclosed the proxy statement, we find the following prominently featured:

> "WARNING
>
> "Crane Co. is making an offer to exchange your WABCO shares for subordinated debentures of Crane Co.
>
> "This represents the latest step by Crane in its campaign to take over control of your company.

> "We must make certain points very clear:
>
> "(1) This offer was not negotiated with your Management.
>
> "(2) If you tender your shares to Crane, you are irrevocably bound. You may not withdraw your shares if you change your mind or wish to sell. In contrast you may vote the enclosed proxy for the American Standard merger and are still free to revoke your proxy or sell your shares or accept Crane's offer."

At page 37 of the proxy statement, a statement is made concerning the details of the controversy with Crane Co. over the merger. This proxy statement is in evidence and there is no need for me to set it forth at length in this opinion.

In addition, on page 6 of the proxy statement of Air Brake we find the following statement made:

> "*Management of WABCO after Merger*
>
> "It is contemplated that the business conducted by WABCO prior to the consummation of the merger will be continued thereafter by the present personnel of WABCO in a new wholly-owned subsidiary of American Standard which will be named Westinghouse Air Brake Company. . . ."

It is apparent, therefore, that all of the facts from which Crane erroneously deduces improper motives were fully disclosed to Air Brake's stockholders.

[*Competition Between Suitors*]

Then Crane complains that there was a wrongful failure to disclose the fact that Crane and American Standard are substantial competitors and that Air Brake did not disclose a Department of Justice letter of inquiry.

[*Potential Antitrust Liability*]

Crane contends that Air Brake's directors should have stated in the proxy material that American Standard and Crane are substantial competitors, and that Crane, as the largest stockholder of Air Brake, might expose the merged company to antitrust liability, and that this situation had provoked an inquiry from the Antitrust Division, and that this was a material fact and, therefore, should be and would be a consideration as to whether the merger should be approved.

The answer to this contention is that the law does not require the management in a proxy statement to attempt to prophesy all the remote, uncertain or possible consequences, beyond their control, of the proposed merger. The fact that Crane was the largest stockholder in Air Brake might or might not have some antitrust effect on American Standard. At the time of the proxy statement, no action had been instituted or threatened by the Department of Justice and we have no evidence that any such action has been filed. Therefore, it would have been rash on the part of Air Brake's to discuss the possibility of any such action, absent good reason and cause for doing so.

The Securities Commission itself in a letter to American Standard dated April 2, 1968, outlined the events which would require disclosure in this language:

> "If any notice has been received by any parties to the merger agreement from any Federal authority with respect to any action instituted or contemplated relating to, restraining or prohibiting the proposed trans-

> action, disclosure should be made in the proxy statement."

It is also significant that if Crane was the largest stockholder it was by deliberate action taken continuously and after the proxy statement had been circulated. Since Crane was active against the merger, it is not unlikely that it would, if occasion required, exercise its right to have the stock appraised in court and then remove this claimed obstacle to any merger.

The letters of McCord, the chairman of Air Brake, to its stockholders of December 13th and 16th, 1967, warning the stockholders of the growing accumulation of Air Brake stock by a nominee later revealed to be Crane, even if part of the solicitation, were not false and misleading. These letters fully advised the stockholders of Air Brake of the situation with respect to Crane and its acquisition and holdings, to the extent that Air Brake had such knowledge.

[*Accounting Methods Proper*]

Finally, I came to Crane's attack on the accounting methods employed by Air Brake to state American Standard's 1967 earnings and particularly the statement that the earnings for this year are stated to be $1.30 per share, when in truth and in fact, they should have been stated as 97 cents a share.

Plaintiff reaches this lower figure by charging that proper accounting methods required that unrealized foreign exchange losses of consolidated foreign subsidiaries be charged against net income rather than against the reserve which had been specifically set up to absorb such unrealized losses and gains.

This was a method of accounting, which had been followed by American Standard since 1959 and was dated back to be effective from 1954 and has been continued to date.

It is contended that because of an amendment to a rule or regulation of the Society of Accountants there should have been a change made effective for the calendar year 1967.

I find that such a change was not required or made necessary in the proxy statement in order to give the stockholders of Air Brake a full, complete, accurate and truthful picture of the financial status of American Standard or of Air Brake. There was testimony of American Standard's accountants, a reputable accounting firm that had long been auditing the books of American Standard, and of experts called by American Standard that the generally accepted accounting procedures followed by these companies and similar procedures have been followed and are being followed by other companies.

I find the plaintiff's expert testimony did not refute this by a fair preponderance of the evidence. The best that emerged from all the testimony on the subject seemed to be that the accounting profession is desirous of establishing uniformity in reporting such losses or gains, at least to stockholders, and that they advocate that these losses be taken against and gains credited to income rather than to a reserve as reflecting a truer picture. There was no criticism by plaintiff's expert witnesses of the setting up of this reserve in 1959.

Then plaintiff attacked a statement that American Standard's final results improved in 1967 after a two-year decline because it failed to disclose that this was the result of a combination of non-recurring loss and the consolidation of a foreign subsidiary which produced extraordinary income.

I find that the credible testimony was that the method used by American Standard was according to generally accepted accounting procedures and presented a true financial picture.

[*Depositions Review*]

The balance of plaintiff's charges of omissions and misstatements I find to be without substance. The evidence discloses that the proxy statement approved by the Commission gives evidence of much thought, as do the extraordinary pre-solicitation letters of McCord to the stockholders, and here I should make note of the testimony which is disclosed in the depositions which were received in evidence. There is no question but that beginning at least in the latter part of May, 1967, or the beginning of June, 1967, Crane set out upon a program and began a program of stock acquisition and other activities designed to further and to accomplish a merger, if at all possible, between Crane and Air Brake. It also appears from these same depositions that Air Brake's management was fully advised of the efforts of Crane to effect a merger at least beginning around the middle of July, 1967, and that just as Crane had been acting through its chairman, Evans, with the advice of counsel and of accountants, so then, beginning the middle of July, 1967, Air Brake secured and obtained and acted upon the advice of its accountants, house counsel and general counsel and the advice of a proxy solicitation public relations firm and were preparing to resist the attempts of Crane to force a merger of Air Brake with Crane.

Each step taken by Crane and each step taken by Air Brake was carefully thought out and planned. The stakes were high and their steps were measured and weighed before they were taken. Each circular, each instrument, each paper, each act I find was taken only after consultation and advice. Under these circumstances, being put upon their guard that the actions of each were being watched, they were extremely careful in what they said and did. I think that care guided them throughout all the statements and all their activities.

We might make the same observation with reference to American Standard. The depositions disclosed that from around the middle of March, 1968, when American Standard first evinced a definite interest in effectuating a merger with Air Brake, it, too, sought the advice of counsel, of a banker and it, too, sought the advice of an accountant and particularly did it pay attention that the acquisitions and purchases should not place it in the position of one being placed in an interest. However, whatever the true motives of management of Air Brake might be in recommending the merger of Air Brake with American Standard rather than Crane is of no concern to this Court. Suffice it to say that there has been no hint and no evidence of any improper motives. Certainly the prevention of a takeover of the company is not actionable unless the law has been violated and I find no federal statute or rule has been violated.

[*Conclusion*]

The complaint is dismissed upon the merits. The clerk is directed to enter forthwith a judgment in favor of the defendants upon the merits with taxable costs and disbursements, and it is so ordered.

I think at this time, gentlemen, I should express my thanks and my appreciation to each and every one of you for the cooperation you have given me in the conduct of the pre-trial proceedings had in this matter and in the trial itself, and for that I'm grateful to you. Thank you.

APPENDIX C

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* * * * *

Opinion of the District Court Denying Motion for Preliminary Injunction

The Court: I recognize, Mr. Castles, ordinarily you would be entitled to an extended opinion denying relief of this nature because it is an appealable order. I haven't had the time to write out any opinion.

I have indicated to you, however, that I have read all the depositions which were submitted in evidence last Wednesday. I did so yesterday. I have indicated to you that it was quite evident from the depositions that I read that all of the parties from the time they became interested in this matter acted on the advice of counsel. It is apparent that the Crane Company and Mr. Evans, acted under the advice of counsel, both legal counsel and accounting counsel, at least in the beginning of June, 1967.

It is apparent, too, from the deposition of I think the president or chairman of the board of Westinghouse that at least from July 10 or 15, I don't remember the exact

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date, about that time, Westinghouse Air Brake was consulting with house counsel, general counsel and accountants and representatives of Jorgenson Company, the proxy advisers, and these conferences were all directed with the idea of protecting themselves against committing any violation of the law with relation to the possibility of any pending contest which might arise with either the Crane Company or anybody else, and that each step that they took, each step that Westinghouse took, was guided, Mr.

McCord testified, by advice of legal counsel, accounting counsel and, I might say, public relations counsel, so that the law would not be violated and public relations would not be offended.

Though the evidence isn't as full and in as full and in as great detail as concerns Westinghouse, it is apparent that that same course was followed by Evans and by Crane Company.

The evidence is, too, that beginning around the 15th of March of 1968, when American Standard evinced a definite interest in a possible merger, that they, too, had the advice of counsel, particularly so their holdings would not exceed 10 per cent, making them a controlling interest subject to special laws and special regulations, and that in each step they took they too were guided by advice of counsel and by accounting advice.

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This becomes especially important with reference to Westinghouse Air Brake and with reference to American Standard, because it is quite evident that at least Westinghouse Air Brake in preparation of their report on the stockholders' meeting at which the merger was to be voted upon prepared themselves with meticulous care and with a special view so that the provisions of the federal laws should not be violated.

The same observation, I think, might well be made of the notice to the stockholders which went out to the stockholder American Standard concerning their meeting at which the proposed merger was voted upon.

Mr. Castles: Your Honor, your statement with reference to meticulous care, did that refer to the proxy statement of the Air Brake Company?

The Court: That refers to the two statements and to all their actions, statements which for convenience I

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might describe as being statements which are annexed, the ones that I already found ready access to, were annexed to the affidavit which Mr. Pomerantz at one time submitted of Thomas M. Evans. There is a statement there of Westinghouse on this meeting, on which votes were cast on May 16th, and there was also a printed—I don't see where that is now, it must be upstairs. You know the two statements I refer to.

Mr. Castles: That is what I wanted to be sure of. Was your Honor's statement that meticulous care was used in the preparation of—

The Court: Meticulous care was used in connection with every step that they took.

Mr. Castles: Including the preparation of the proxy statements?

The Court: Including the preparation of the proxy statements, yes, no doubt about it, from the time they evinced an interest. There were different stages where that preparation began. I think it began with Crane in June, 1967. Mr. Evans seemed to indicate that. It began with Westinghouse Air Brake around July 10th or 15th, I forget the exact date, of 1967, and he said he had definite

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information. In fact, Evans had told the chairman of the board of Mellon Bank that he had a certain substantial amount of holdings, and it is evidenced here from a statement that was submitted that at that time he did have approximately 50,000 shares that had been accumulating.

It also appears from the evidence that American Standard Plumbing, when they evinced a definite interest in the possibility of a merger, which was around the middle of March, 1968, I think it was the middle of March—you are more familiar with the dates than I am—that from that point on every step they took was guided by advice of counsel.

Mr. Castles: Yes, sir.

The Court: Those are the conclusions and inferences which seem to me to be irresistible from the evidence presented and from the reading of the depositions which have been received in evidence.

Mr. Castles: Yes, sir.

Your Honor, I want to proceed to a point. I think it is Rule 10 of the local rules which provides that the order of the Court must be embodied in a separate document.

The Court: If you have an order, I will endorse it.

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Mr. Castles: Is it necessary to submit such an order? I seem to remember there is a case which holds that a mere endorsement on the applications—

The Court: The trouble is that I don't have time to write an extended opinion; and I have held up the decision in this matter. When I say "this matter," I mean the application for an injunction has been held up pendente lite. My reasons are set forth in my observations made here now. My present inclination is not to disturb what I think is the natural status quo, and the natural status quo is to leave things go ahead the way they have been.

Have you other papers here on this? If they are here, maybe I will make such an endorsement on their back.

(Discussion off the record.)

The Court: Mr. Castles, you read just before we adjourned this morning from your statement of the holdings of Crane. It might be well if you could have that typewritten and put in evidence as a written statement on Monday, as a statement which you claim are the holdings.

Do you remember the paper you read from?

Mr. Castles: Yes, I do.

The Court: Your statement is in the record.

Mr. Barnum: In that connection, could we have it clarified whether that purports to be a statement of all the shares of Westinghouse Air Brake tendered and accepted by Crane Company?

The Court: I understood that it was.

Mr. Barnum: I understood it should be, but I noticed there were no tenders subsequent to the 2nd of May listed on that particular sheet. I think we are talking about Exhibit 1-A.

Mr. Castles: We are talking about the statement I read into the record.

The Court: Exhibit 1-A shows that beginning on April 15, according to the statement that was presented, there were additional shares acquired under the Crane offer totalling 531,285 shares.

Then I understood from Mr. Castles' statement that there were additional stock ownership acquisitions after

the last entry on this acceptance offer of May 2nd which brought that total up.

Mr. Castles: Yes, there are additional acquisitions.

Mr. Barnum: Then I don't understand the purpose of Plaintiff's Exhibit 1-A.

The Court: Exhibit 1-A simply shows the additional amounts up to May 2nd.

Mr. Barnum: Can we have that supplemented so it is a complete exhibit with respect to all shares tendered?

The Court: Yes, that is what I had in mind, because it was after Exhibit 1-A was received in evidence that Mr. Castles read from a yellow sheet of paper, apparently the result of some telephonic communication. I suggest to him it would be preferable if he would have that transcribed and typewritten so that we could annex it to Exhibit 1 and we will call it 1-B. Then we will have a continuity of acquisition.

I have the two papers I was looking for. One is the order to show cause of May 15, 1968. I can endorse that.

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The Court: Suppose we take a recess and we will do it inside. You lawyers can come inside.

(Recess.)

The Court: Gentlemen, I have hurriedly written out an endorsement which I would like to have transcribed. You will have an endorsement which will be in the nature of an order annexed to the order to show cause which I granted on May 15, 1968, at the plaintiff's request, an application in these consolidated actions.

I will read it to the stenographer and, for fear I might have misstated some evidence or misstated your position, I will permit you to call to my attention any particular portion where you feel I was inaccurate in my historical recitals. The decision that I make of course is my own and I don't want to hear argument on that, but I don't want to embody in this endorsement order any facts either historical or those representing a position taken by counsel which does not accord with the facts.

You will have in mind what I seek to accomplish here.

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I want to give Mr. Castles an order, as he is entitled to. We have been working under extreme pressure in this matter, and what has been accomplished in a very short time could never have been accomplished if I didn't have the cooperation of counsel on all sides, for which I am grateful.

My endorsement would read, and I will read it slowly:

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The attached order to show cause issued on May 15, 1968, upon application of plaintiff Crane Company in these consolidated actions. Its entry followed pretrial conferences held by this Court on May 8th and May 15th, 1968.

Upon the signing and the return of the order to show cause on May 17, 1968, the attorneys for the defendants in the consolidated actions stipulated that the certificates of merger would not be filed if the merger was found to have been approved by a 51 per cent vote of the stockholders of Westinghouse Air Brake Company at a special stockholders meeting of May 16, 1968, until the Court was notified of the impartial canvass of the vote at the special meeting of Westinghouse Air Brake stockholders. The plaintiff's attorneys also stipulated that the meeting of May 16, 1968, might proceed and all stockholders cast such votes as they might claim to be entitled to cast, subject, of course, to official canvass and subject to judicial determination as to their legal right to cast such vote.

The Court thereupon proceeded with the trial of this consolidated action upon the merits to determine whether

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permanent injunctive relief should be granted the plaintiff as prayed for in its consolidated complaint. Evidence has been heard as to these issues as the trial continued on May 17th, 21st, 22nd, 28th, 29th and 31st, 1968.

The canvass of the vote has now been completed by the impartial canvassers and defendants have expressed an intention to forthwith file certificates of merger by the corporations affected by the merger; the canvassers having reported and found that more than 51 per cent of Westinghouse Air Brake stockholders have approved and voted for the said merger. The plaintiff now asks that the temporary injunction prayed for in the order to show cause be forthwith granted.

Plaintiff's motion is denied. This denial is without prejudice to any right that plaintiff may have to seek injunctive relief in any court other than a court of Federal jurisdiction, or to press any action or proceeding it may elect to file or pursue to enforce any right it may have under the laws of Pennsylvania or Delaware, the States of incorporation of the corporate entities which are

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to be merged, or of any other State.

The trial of the consolidated action has been practically completed. One expert accounting witness is to be called by plaintiff, and the trial is to be continued for that purpose and for summation of the parties on Monday, June 3, 1968.

Upon the record thus far made, I find no just cause to grant the temporary relief so sought by plaintiff, and there is no showing of irreparable injury nor, at this stage of the trial, of probable success of plaintiff.

I have briefly stated my findings which have led me to this conclusion on the trial record. If, after completion of the evidence and summation on June 3, 1968, I find that plaintiff's prayer for permanent relief should be granted, full power to enforce this relief rests with this Court.

Motion for temporary injunctive relief is denied. So ordered.

May 31, 1968.

....

U.S.D.J.

(Adjourned to Monday, June 3, 1968, at 10:00 o'clock a.m.)

APPENDIX D

Section 10 of the Securities Exchange Act

Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. 15 U.S.C. § 78j.

APPENDIX E

Section 14(a) of the Securities Exchange Act

Sec. 14. (a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title. 15 U.S.C. § 78n(a).

APPENDIX F

Rule 10b-5

Reg. § 240.10b-5. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact; or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. 17 C.F.R. § 240.10b-5.

APPENDIX G

Rule 14a-9

Reg. § 240.14a-9. (a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

Note: The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this rule:

(a) Predictions as to specific future market values, earnings, or dividends.

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation.

(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

(d) Claims made prior to a meeting regarding the results of a solicitation. 17 C.F.R. § 240.14a-9.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 212

CRANE COMPANY,

Petitioner,

v.

WESTINGHOUSE AIR BRAKE COMPANY, A. KING McCORD, EDWARD J. HANLEY, EDWIN HODGE, JR., FRANK L. MAGEE, JOHN A. MAYER, G. ALBERT SHOEMAKER, ERIC L. WALKER, LAWRENCE E. WALKLEY, JAY V. WILCOX, LESLIE B. WORTHINGTON, AMERICAN STANDARD and BLYTH & CO.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT AMERICAN STANDARD INC. IN OPPOSITION

Edward W. Keane
Counsel for Respondent
American Standard Inc.
48 Wall Street
New York, N. Y. 10005

George C. Kern, Jr.
[illegible] M. Osgood
[illegible] & Cromwell
[illegible] *Counsel*
[illegible] 70

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IN THE

Supreme Court of the United States

October Term, 1969

No. 1642

CRANE COMPANY,
Petitioner,

v.

WESTINGHOUSE AIR BRAKE COMPANY, A. KING MCCORD, EDWARD J. HANLEY, EDWIN HODGE, JR., FRANK L. MAGEE, JOHN A. MAYER, G. ALBERT SHOEMAKER, ERIC L. WALKER, LAWRENCE E. WALKLEY, JAY V. WILCOX, LESLIE B. WORTHINGTON, AMERICAN STANDARD and BLYTH & CO.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT AMERICAN STANDARD INC. IN OPPOSITION

This brief, responsive to the petition for certiorari filed by Crane Company ("Crane") on June 2, 1970, is submitted on behalf of American Standard Inc. ("Standard") as successor in interest of Westinghouse Air Brake Company ("Air Brake"). Air Brake, which was a defendant in the District Court and is designated by Crane as a respondent here, was merged into Standard on June 7, 1968 and no longer exists as a separate entity.*

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* Blyth & Co., which Crane also names as a respondent, was not a party to this case below although it was a defendant in a separate action that was consolidated with the present case in the District Court. We have been authorized to advise the Court that Blyth & Co. does not join in this Brief in Opposition because Crane's petition charges it with no offense and seeks no relief against it.

Jurisdiction

Crane's petition is untimely. The judgment of the Court of Appeals, which covers two separate lawsuits that were consolidated in the District Court, was entered December 10, 1969 and the petition was filed with this Court on June 2, 1970, long after the expiration of the 90-day period prescribed by 28 U.S.C. § 2101(c).

Crane's time cannot be deemed to have been extended by the filing of Standard's petition for rehearing in the Court of Appeals, which was denied on March 4, 1970, because Standard's rehearing petition was addressed solely to a separate case involving Crane's claim of "market manipulation" against Standard and Blyth & Co. ("Blyth"); it in no way concerned Crane's proxy-statement case against Air Brake and its directors, which is the subject matter of the present petition for certiorari.

The separateness of these two claims is pointed up by the fact that they derive from different lawsuits brought under different complaints by different counsel against entirely different sets of defendants—the manipulation claim against Standard and Blyth (R. 58, S.D.N.Y. No. 68 Civ. 1845), and the proxy-statement claim against Air Brake and its directors (R. 1, S.D.N.Y. No. 68 Civ. 1560). Although consolidated in the District Court as a matter of convenience and economy, the two cases were not merged into a single cause, but retained their separate docket numbers and separate identities in both the District Court and the Court of Appeals,* and are still to be regarded as separate actions. See

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* The proxy-statement case was given Docket Nos. 32569 and 32570 in the Court of Appeals, and the "manipulation" case was given Nos. 32571 and 32572. The double numbers reflect the fact that

Johnson v. *Manhattan Ry.*, 289 U.S. 479, 496-97 (1933); *Zdanok* v. *Glidden Co.*, 327 F.2d 944, 950 n.6 (2d Cir.), *cert. denied,* 377 U.S. 934 (1964); *Abrams* v. *Occidental Petroleum Corp.*, 44 F.R.D. 543, 547 (S.D.N.Y. 1968).

Since Crane did not seek rehearing in the Court of Appeals with respect to the proxy-statement case against Air Brake and its directors (No. 68 Civ. 1560), the Court of Appeals would not have disturbed its decision in that case even if rehearing had been granted in the "manipulation" case against Standard and Blyth (No. 68 Civ. 1845). Accordingly, the Court of Appeals' judgment, insofar as it relates to the proxy-statement case (No. 68 Civ. 1560), became final more than five months before the present petition was filed. The present petition is therefore out of time.

As this Court pointed out in *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 213 (1952), the statutes limiting this Court's appellate jurisdiction "are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review." See STERN & GRESSMAN, SUPREME COURT PRACTICE § 6.4 (4th ed. 1969).

Questions Presented

We do not agree that Questions 1 and 2 set forth in Crane's petition are properly presented. They rest on factual allegations that both of the lower Courts rejected.

Crane appealed from the District Court's order denying a preliminary injunction as well as from the final judgment dismissing these actions on the merits.

In the Courts below Crane contended that the proxy statement used by Air Brake in support of the proposed merger of Air Brake and Standard was "false and misleading" because it allegedly failed to disclose, *inter alia,* that the Air Brake directors recommended the merger for the purpose of preventing Crane itself from acquiring control of Air Brake and insuring the continuation of the existing Air Brake management. After a full trial on the merits, the District Court ruled in favor of Air Brake, holding that the evidence did not support Crane's charge that this was the reason for the merger recommendation, that there was no evidence that the Air Brake directors acted out of improper motives, that all of the facts from which Crane erroneously deduced improper motives were fully set forth in the proxy statement and that Crane's other charges of omissions and misstatements in the proxy statement were "without substance" (App. B of Petition, pp. 41a-42a, 46a-47a). The Court of Appeals, after reviewing the extensive evidence relating to these claims, affirmed.

In view of the adverse decision by both of the Courts below, it is understandable that Crane does not ask this Court to review again its twice-rejected factual contentions, which involve voluminous and complex evidence thoroughly explored in the Courts below. Nevertheless, in its petition for certiorari Crane asks this Court to determine whether a "purpose of preventing a takeover" and the existence of supposedly "reliable information" unfavorable to the proposed merger are "material" facts requiring disclosure under SEC Rule 14a-9, 17 C.F.R. § 240.14a-9. Since both of the Courts below properly rejected Crane's factual allegations as being unsupported by the evidence, and since Crane does not ask this Court to overturn those factual determinations, the materiality of the unsubstantiated "facts" set forth in Crane's petition is a purely hypothetical question not properly presented to this Court for review.

In Question 3 of its petition Crane seeks to raise an issue that was not set forth in the pleadings in this action and that was not discussed by the Court of Appeals in its opinion. Moreover, Question 3 fairly comprises the subsidiary and antecedent question whether Standard "artificially inflated the market price of [Air Brake] stock by manipulative wash sales," a question that Standard wishes to brief and argue in the event certiorari is granted. However, the issue of "manipulation", while not squarely raised in the case presently before this Court, is the subject of the separate action (No. 68 Civ. 1845) that the Court of Appeals has remanded to the District Court for further proceedings. Inasmuch as the entire issue of manipulation will be subject to later review by this Court in the other case after conclusion of the remanded proceedings and after receipt of further evidence, the issue of manipulation is not ripe for this Court's consideration at this time and on this record.

Statement

This litigation arises out of an attempt by Crane to force a takeover of Air Brake.

On March 4, 1968 Air Brake publicly announced that it had entered an agreement to merge with Standard, subject to the approval of the Air Brake stockholders at a meeting to be held on May 16. The merger agreement was the culmination of lengthy study and negotiation by the Air

Brake management, as the record abundantly shows* and as the Court of Appeals recounted in its opinion (App. A of Petition, pp. 26a-30a). Some months before, the Air Brake management had rejected a merger proposal by Crane, in part at least because of dissatisfaction with the quality of the Crane management (Ex. 25A, pp. 83-84), but notwithstanding the rebuff, Crane not only retained the substantial block of Air Brake stock it had secretly accumulated (it held nearly 10% of the outstanding stock by mid-January) but proceeded to make substantial additional purchases—first on the stock exchange and later through a public tender offer—and at the same time it sought by a variety of means to frustrate Air Brake's prospective merger with Standard. All of its efforts failed. At the May 16 meeting of the Air Brake stockholders, the Air Brake stockholders voted overwhelmingly in favor of the merger. Very few Air Brake shares other than the 32% controlled by Crane itself were voted against the merger, which became effective on June 7, 1968. Within a week after the merger Crane disposed of all but a token part of its former Air Brake holdings in a record-breaking stockmarket transaction in which it realized a gross cash profit of more than $10 million. There is pending in the District Court an action by Standard to recover part of this profit under the short-swing trading provisions of Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b).

The present petition arises out of a civil action begun by Crane on April 17, 1968 in the Southern District of New York (No. 68 Civ. 1560) in an attempt to enjoin Air Brake and its directors from soliciting and voting proxies in favor of the merger at the May 16 stockholders' meeting. In its complaint Crane charged that the Air Brake proxy statement violated Sections 14(a) and 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78n(a), 78j(b), in that it failed to "set forth a full, fair and complete statement of all the facts and circumstances leading to the making of the merger agreement with Standard," including "the actual reasons for the merger" (R. 1, par. 15). On May 6, 1968 Crane commenced a second action in the same Court (No. 68 Civ. 1845) in which it charged Standard and Blyth (Standard's financial advisor) with "vote-buying" and "market manipulation" with respect to Air Brake stock. These two actions were subsequently consolidated and tried together.

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* See, *e.g.*, Ex. 25-A, pp. 119-123; Ex. 25-B, pp. 225-226, 236, 239, 242-245, 249, 251-256, 259-260, 279-289; Ex. 25-C, pp. 316, 353, 358, 366.

The trial began on May 21 and, with minor interruptions, continued until June 3. At the conclusion of the trial the District Court (which denied Crane's motion for a preliminary injunction on May 31) dismissed both of Crane's actions after delivering an opinion in which the following findings, among others, were made:

> (a) Crane failed to prove that the reason why the Air Brake management recommended the merger was to forestall Crane from acquiring control of Air Brake and to ensure the continuance of Air Brake's management. (App. B of Petition, p. 41a)
>
> (b) There was no evidence of improper motives on the part of Air Brake's management in recommending the merger with Standard. (*Id.*, p. 47a)
>
> (c) Crane's attempted takeover of Air Brake and the expectation that Air Brake's management would continue to be employed after the merger were clearly

set forth in Air Brake's proxy statement. (*Id.*, pp. 41a-42a)

(d) All of the facts from which Crane erroneously deduces improper motives were fully disclosed to Air Brake's stockholders. (*Id.*, p. 42a).

The Court of Appeals unanimously affirmed the District Court with respect to the proxy-statement case (No. 68 Civ. 1560), holding that "the relevant facts were fairly stated in the proxy statement" (App. A of Petition, p. 29a) and that:

(a) The proxy statement accurately reported that the Air Brake directors had given due consideration to the merger. (*Id.*, pp. 26a-29a)

(b) Crane's allegations did not establish that the Air Brake directors had practiced a deception upon the corporation or that they had failed to exercise the care required of them as fiduciaries. (*Id.*, pp. 28a-29a)

(c) The Air Brake directors were not without a reasonable basis in fact for recommending the merger with Standard. (*Id.*, p. 29a)

(d) There were no improper motives underlying the action of the Air Brake directors, and the proxy statement fairly set forth the facts regarding the proposed merger, including the fact that the directors opposed the Crane takeover and that certain Air Brake personnel would be employed after the merger. (*Ibid.*)

(e) The Air Brake directors did not breach their duty of disclosure with regard to the proxy statement. (*Id.*, p. 30a)

Crane filed no petition for rehearing of this decision affirming the dismissal of the proxy-statement complaint.

In the same opinion, the Court of Appeals reversed the "manipulation" case (No. 68 Civ. 1845), holding that

Standard's transactions in Air Brake stock on one day, April 19, violated Sections 9(a) and 10(b) of the Securities Exchange Act, 15 U.S.C. §§ 78i(a), 78j(b), and remanding the case to the District Court for further proceedings. Upon the remand, Crane has formally advised the District Court that it seeks not only compensatory and punitive damages, but "divestitute or separation of Air Brake from Standard", presumably the same relief that Crane seeks by means of the proxy-statement claim it asks this Court to review.

Argument

I.

The chief reason advanced by Crane in support of the petition for certiorari is the asserted conflict between a statement made by the Court below and what amounts to a dictum in this Court's subsequent opinion in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). In its decision below, the Court of Appeals referred to a "material fact" as a fact "that would influence the stockholders to act differently if disclosed" (App. A of Petition, p. 30a). In the *Mills* case this Court said that "where a misstatement or omission in a proxy statement has been shown to be 'material,' . . . that determination itself indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote." 396 U.S. at 384.

It is perfectly clear that nothing in either the present case or *Mills* hinges on the nice distinction Crane professes to find in these phrases.

In *Mills* this Court decided what causal relationship must be shown between a materially false proxy statement and the resulting merger in order for a cause of action to be established (396 U.S. at 377); the lower courts had already found that the proxy statement in question was materially misleading, and this Court specifically refused to review that determination (396 U.S. at 381 n.4). In the present case both the Court of Appeals and the District Court treated the proxy statement issues as primarily issues of fact, and based their decision on the evaluation of voluminous and complex evidence developed during extended trial and pretrial proceedings. Since the Courts below found no false statements or omissions in the Air Brake proxy statement, they had no question of materiality before them.

II.

The principal "facts" on which Crane relies in its petititon are not facts at all but mere allegations that the Courts below properly rejected as unsupported by the evidence. The cornerstone of Crane's complaint was the charge that the Air Brake directors had agreed to the Standard merger in order to avert a takeover by Crane, and that this alleged purpose had been wrongfully omitted from the proxy statement. Crane's petition, on virtually every page, repeats this allegation as though it were a fact that has been established, and not once does it disclose that far from being an established fact it is nothing more than an allegation that has been squarely rejected by both Courts below. The District Court explicitly ruled that this allegation had not been proved:

> "I come to the charges of falsity in the proxy statement made against Air Brake. It is charged, first, that the Air Brake management failed to disclose that one of the reasons, if not the sole reason, for Air Brake's recommendation of the American Standard merger was to forestall Crane from acquiring control of Air Brake and to insure the continuance of Air Brake's present management.
>
> "The defendant Air Brake has denied that this was the reason for the recommendation, and plaintiff has failed to establish its contention to the contrary." (App. B of Petition, p. 41a)

The findings that there were no false statements or omissions in the Air Brake proxy statement, explicitly affirmed by the Court of Appeals (App. A at Petition, pp. 20a-30a), means that there is no genuine issue of materiality presented to this Court.

III.

Crane's other objections to the proxy statement, advanced in Question 2(ii) of the petition, were found by the District Court to be "without substance" (App. B of Petition, p. 46a). The Court of Appeals, after detailed advertance to financial statements, text of the proxy statement and underlying evidence, likewise rejected the claims of misleading statements or omissions in the proxy statement. (App. A of Petition, pp. 20a-30a).

It is clear from the opinions of the Courts below that their findings of fact based on a lengthy record were dispositive of Crane's proxy statement claims. Consequently, this Court would have to overturn the uniform factual findings of the two lower Courts before ever reaching the artificial issue of law that Crane's petition seeks to create.

IV.

There are further considerations applicable to Crane's contention that the alleged "market manipulation" should have been disclosed in Air Brake's proxy statement. In fact, there has not yet been a definitive determination of whether there was a manipulation at all—a complex issue of fact and law as to which the Courts below were in disagreement. The Court of Appeals has remanded the "manipulation" case against Standard and Blyth (No. 68 Civ. 1845) to the District Court for further proceedings, including the determination of the crucial question of what effect, if any, the alleged manipulation may have had. Standard strongly controverts the Court of Appeals' decision in the "manipulation" case, and of course the issue of manipulation, after completion of all proceedings below, will be subject to review by this Court on the completed record and in light of the remedies, if any, that the District Court has decreed in that case. The correctness of the Court of Appeals' ruling on manipulation is of course antecedent to the question, tendered by Crane's petition, whether the alleged "manipulation" should have been disclosed in the Air Brake proxy statement.

In these circumstances we submit that the manipulation issue is not ripe for review on this record or at this time.

CONCLUSION

For the foregoing reasons Crane's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

Edward W. Keane
Counsel for Respondent
American Standard Inc.
48 Wall Street
New York, N. Y. 10005

George C. Kern, Jr.

Robert M. Osgood
Sullivan & Cromwell
Of Counsel

July 2, 1970

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In the
Supreme Court of the United States
October Term, [redacted] 1970

No. [redacted] 212

CRANE COMPANY,
Petitioner,
v.
WESTINGHOUSE AIR BRAKE COMPANY, A. KING McCORD, EDWARD J. HANLEY, EDWIN HODGE, JR., FRANK L. MAGEE, JOHN A. MAYER, G. ALBERT SHOEMAKER, ERIC L. WALKER, LAWRENCE E. WALKLEY, JAY V. WILCOX, LESLIE B. WORTHINGTON, AMERICAN STANDARD and BLYTH & CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR INDIVIDUAL RESPONDENTS IN OPPOSITION

John W. Barnum,
Attorney for the individual respondents,
One Chase Manhattan Plaza,
New York, N. Y. 10005

Donald I Strauber,
Richard M. Hirsch,
Of Counsel.

July 2, 1970

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OCTOBER TERM, 1969

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WESTINGHOUSE AIR BRAKE COMPANY, A. KING MCCORD, EDWARD J. HANLEY, EDWIN HODGE, JR., FRANK L. MAGEE, JOHN A. MAYER, G. ALBERT SHOEMAKER, ERIC L. WALKER, LAWRENCE E. WALKLEY, JAY V. WILCOX, LESLIE B. WORTHINGTON, AMERICAN STANDARD and BLYTH & CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR INDIVIDUAL RESPONDENTS IN OPPOSITION

This brief in opposition to the petition of Crane Company ("Crane") for a writ of certiorari is submitted on behalf of the ten individual respondents, defendants below.

Westinghouse Air Brake Company ("Air Brake"), the other defendant below and named here as a respondent, is no longer in existence as a separate entity, having been merged into American Standard Inc. ("Standard") on June 7, 1968.

Standard and Blyth & Co., Inc. ("Blyth"), also named as respondents, were not parties to the suit which Crane seeks to pursue in this Court and they are not subject to that part of the order and judgment of the United States Court of Appeals for the Second Circuit for which review is sought.

Opinions Below

The opinion of the Court of Appeals is reported at 419 F. 2d 787 and reprinted as Appendix A to the petition. The opinion of the District Court is reported at CCH Fed. Sec. L. Rep. ¶ 92, 228 and reprinted as Appendix B to the petition. The opinion of the District Court denying Crane's motion for a preliminary injunction is unreported but is reprinted as Appendix C to the petition.

Jurisdiction

Crane invokes the jurisdiction of this Court under 28 U. S. C. § 1254(1), but this Court in fact does not have jurisdiction because the petition was not filed within the time required by law.

The judgment of the Court of Appeals was entered on December 10, 1969. It affirmed the dismissal by the District Court of counts one and two of the consolidated complaint, on which Air Brake and the individual respondents herein were the defendants, and it reversed the dismissal of count three of the consolidated complaint, on which Standard and Blyth were the defendants. (Originally, counts one and two were in one complaint and count three was in a separate complaint.) On December 24, 1969, Standard filed a petition for rehearing or rehearing *en banc* directed at that portion of the Circuit Court's judgment which pertained to count three. On March 4, 1970, the Court of Appeals denied that petition without opinion. Neither Crane nor Standard nor any other party took any action with respect to the Circuit Court's judgment as to counts one and two of the consolidated complaint. Thus, the judgment of the Court of Appeals with respect to those counts having become final on December 10, 1969, the last to petition for a writ of certiorari from such judgment was March 10, 1970. Crane however did not file its petition for a writ of certiorari until June 2, 1970. This was not timely, as is shown in part I of our argument.

Counterstatement of Questions Presented

Questions 1 and 2 stated in Crane's petition assume the existence of facts which both courts below determined were unfounded assertions. Question 3 is premised upon a factual contention which was not even asserted below and which has no support in the record. Hence, in asking this Court to determine whether certain "facts" were material and should have been disclosed in a proxy statement, Crane has presented hypothetical questions that are not properly before this Court.

We submit that the only questions properly before this Court are:

1. Did the filing by Standard of a petition for rehearing of the decision below on the one count to which it was a defendant toll the statutory time period within which petitioner could seek a writ of certiorari with respect to the decision below on the two other counts, which related only to other defendants?

2. Are the concurrent findings of the courts below that the Air Brake proxy statement did not falsely state the reasons for the recommendation of the merger with Standard subject to further review?

Statement

This litigation has its origin in an attempt by Crane to take over Air Brake, and to thwart a merger agreed upon by Air Brake and Standard.

During the latter part of 1967, Crane secretly acquired nearly 10% of Air Brake's outstanding stock and then proposed to the Air Brake management a merger of the two companies. Air Brake's management studied and refused Crane's proposition (R. 54, pp. 188-210).* Crane then embarked upon a program to increase its holdings of Air Brake shares. Initially it purchased shares on the stock exchange, and then by means of a public offer to exchange Air Brake stock for Crane debentures. By mid-April, Crane held about 15% of Air Brake's stock and by the end of May had increased its holdings to approximately 32% (Ex. 1, 1-A).

During the course of Crane's intensive buying campaign, on March 4, 1968, Air Brake announced that it had entered into an agreement to merge into Standard. This agreement was subject to the approval by a majority of the stockholders of each company at meetings to be held on May 16.

Crane mailed its tender offer to Air Brake shareholders during the week of April 8, 1968, the same week in which Air Brake mailed its proxy statement soliciting proxies in favor of the proposed merger with Standard. In addition to pursuing its takeover attempt by means of the tender offer, Crane sought to defeat the Standard merger by solicitation of proxies in opposition to the merger.

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*The Record on Appeal is cited. "R.—".

Crane failed to acquire a majority interest through its purchasing program and tender offer. It also failed to convince the independent Air Brake stockholders to defeat the Standard merger; the independent stockholders voted overwhelmingly in favor of the merger, and very few shares of Air Brake not owned by Crane itself were voted against the merger (Ex. G). Upon the filing of the requisite papers, the merger became effective at the close of business on June 7, 1968.

Prior to the May 16, 1968, meeting of Air Brake stockholders, Crane instituted two actions in the Southern District of New York in which it sought to prevent the merger.

The present petition arises out of the first of those actions, which was commenced by Crane on April 17, 1968 (No. 68 Civ. 1560). Crane alleged in that complaint that Air Brake's proxy statement issued for the stockholders' meeting called to approve the merger was false and misleading and in violation of Sections 14(a) and 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78n(a), 78j(b), and of Regulation 14A and Rule 10b-5 thereunder (R. 1, para. 1). The defendants in the first action were Air Brake and the members of its board of directors (hereinafter referred to as the "proxy defendants"). Messrs. Lord, Day & Lord were attorneys for Crane.

Crane commenced the second action on May 6, 1968 (No. 68 Civ. 1845). In that action, Crane charged that Standard and Blyth had manipulated the price of Air Brake stock on the New York Stock Exchange on April 19, 1968, in violation of Section 10(b) of the Act of 1934 and Rules 10b-5 and 10b-6 thereunder (R. 58, para. 19). Crane further alleged that *Standard*, not Air Brake, failed to disclose the details of its manipulative transactions in the Air Brake proxy statement in violation of Section 14(a) of the 1934 Act and of Regulation 14A thereunder (R. 58, para. 18). Messrs. Pomerantz, Levy, Haudek & Block were attorneys for Crane in the second action.

The two actions were consolidated on May 9, 1968, so that the District Court could try promptly all disputes concerning the Air Brake stockholders' meeting scheduled for the following week. The causes of action asserted against the proxy defendants became counts one and two of a consolidated complaint and the manipulation claim against Standard and Blyth became count three. Although tried together, the two actions retained their separate identities on the dockets of both the District Court and the Court of Appeals and all papers bore both the original captions. (E.g., App. B hereto.)

The trial began on May 21, while the stockholders' meeting was adjourned to count proxies. Crane's motion to preliminarily enjoin the meeting was denied by the Court on May 31 (Pet. pp. 49a-56a). Thereafter, on June 3, the trial was completed and the District Court delivered its opinion directing that both actions be dismissed on the merits.

In its opinion, the District Court made the following relevant findings, among others:

(a) Crane failed to prove that one of the reasons why the Air Brake management recommended the merger was to forestall Crane from acquiring control of Air Brake and to ensure the continuance of Air Brake's management (Pet. p. 41a).

(b) There was no evidence of improper motives on the part of Air Brake's management (*Id.*, p. 47a).

(c) Crane's attempted takeover of Air Brake and the expectation that Air Brake's management would continue to be employed after the merger were clearly set forth in Air Brake's proxy statement (*Id.*, pp. 41a-42a).

(d) All of the facts from which Crane erroneously deduces improper motives were fully disclosed to Air Brake's stockholders (*Id.*, p. 42a).

Crane filed four separate appeals, two each against the proxy defendants and Standard and Blyth from both the final judgment and the earlier order denying a preliminary injunction. On December 10, 1969, the Court of Appeals rendered its judgment affirming the dismissal by the District Court of the action against the proxy defendants and reversing the District Court's dismissal of the action against Standard. The Court of Appeals found that Standard's transactions in Air Brake stock on April 19 were in violation of Sections 9(a)(2) and 10(b) of the 1934 Act (Pet. p. 20a), and it remanded the action against Standard and Blyth based on market manipulation and deception for a determination of the appropriate remedy (*Id.*, p. 30a).

With respect to the Air Brake proxy statement and the actions of the Air Brake directors, however, the Court of Appeals unanimously affirmed the findings of the District Court. Among the findings of the Circuit Court relevant herein were the following:

(a) The proxy statement accurately reported that the Air Brake directors had given due consideration to the merger (Pet. pp. 26a-29a).

(b) Crane's allegation did not establish that the Air Brake directors had practiced a deception upon the corporation or that they had failed to exercise the care required of them as fiduciaries (*Id.*, pp. 28a-29a).

(c) The Air Brake directors were not without a reasonable basis in fact for recommending the merger with Standard (*Id.*, p. 29a).

(d) There were no improper motives underlying the action of the Air Brake directors, and the proxy statement fairly set forth the relevant facts (*Ibid.*).

(e) The Air Brake directors did not breach their duty of disclosure with regard to the proxy statement (Pet. p. 30a).

On December 24, 1969, Standard filed a petition for rehearing or rehearing *en banc* directed at that portion of the Circuit Court's judgment which reversed the lower court's dismissal of Crane's second action.* In its petition, Standard asked the Court to reconsider its decision that Standard had been guilty of manipulating the market price of Air Brake stock. The petition was denied without opinion on March 4, 1970. On June 2, 1970, Crane filed its petition for a writ of certiorari to review its claims that the proxy defendants had distributed a misleading proxy statement.

Argument

I

THE PETITION FOR A WRIT OF CERTIORARI WAS FILED TOO LATE TO GIVE THIS COURT JURISDICTION.

The Court of Appeals affirmed the judgment of the District Court dismissing the action against the proxy defendants on December 10, 1969. Almost six months later, petitioner filed for a writ of certiorari. A petition for a writ of certiorari must be filed within 90 days. 28 U. S. C. § 2101(c). If it is not, this Court does not have jurisdiction. *Department of Banking* v. *Pink*, 317 U. S. 264 (1942); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418 (1923).

Petitioner relies—erroneously—upon a petition for rehearing filed by Standard which was denied on March 4, 1970 (Pet. p. 2). A timely petition for rehearing may extend the time for other parties to seek review where such petition "operates to suspend the finality of the [lower] court's judgment, pending the court's determination whether the judgment should be modified as to alter its adjudication of the rights of the parties". *Department of Banking* v. *Pink, supra*, 317 U. S. at 266. Petitioner wholly fails to note, however, that Standard's petition for rehearing was limited to the decision on the case against Standard and did not and could not affect in any way the finality of the decision on the case against the proxy defendants which petitioner now seeks to review. Standard's petition for rehearing sought review only "insofar as that decision finds that Standard violated Section 9(a)(2) of the Securities Exchange Act of 1934 and Rule 10b-5 of the SEC". (App. A hereto, p. 1a.) Standard's petition for rehearing sought no alteration of the other part of the decision—the part affirming the dismissal of petitioner's claim against the proxy defendants—which petitioner now seeks to review. That part was left to stand undisturbed.

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*Standard's petition for rehearing is printed in Appendix A to this brief. The orders denying rehearing and rehearing en banc are printed as Appendix B.

Where a petition for rehearing or other postjudgment motion does not "suspend the finality" of a court's adjudication and cannot disturb the issues to be presented on appeal, a petition for rehearing or other motion will not toll the statutory time limitation. *F. T. C.* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211, 213 (1952).

> "[W]e cannot hold that the time for filing a petition for certiorari was enlarged simply because this paper may have prompted the court below to take some further action which had no effect on the merits of the decision that we are now asked to review in the petition for certiorari. . . . [Litigants] must take heed of . . . the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate

> jurisdiction. . . . Those statutes are not to be applied so as to admit a tolling of the time limitation because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review." 344 U. S. at 211, 213.

If a petition or motion by a party with respect to one of several issues does not extend the time for a party to petition for certiorari with respect to other issues involving the same defendant, as in *Minneapolis-Honeywell, a fortiori* it does not extend the time to petition on different issues involving different defendants.

The petition herein was not filed within 90 days after entry of the judgment sought to be reviewed, as required by 28 U. S. C. § 2101(c), and should be dismissed for want of jurisdiction. *Dept. of Banking* v. *Pink, supra; F. T. C.* v. *Minneapolis-Honeywell Co., supra.*

Although issues that are sought to be reargued by one defendant may be so "inextricably linked" with issues to be appealed that rehearing on the former may toll the time to petition for certiorari as to the latter, *cf. United States* v. *Adams,* 383 U. S. 39, 41-42 (1966), that is not the case here. Petitioner's claims were against different parties and on different grounds. One was against Standard and Blyth for market manipulation, and the other was against Air Brake and its directors for a false and misleading proxy statement. These two different claims were accordingly separately presented and decided below, the Court of Appeals dealing separately in its opinion with the claim against Standard (Pet. pp. 5a-20a) and the claim against Air Brake and its directors (Pet. pp. 20a-30a). The Court of Appeals holding that Standard had violated section 9(a)(2) of the Securities Exchange Act and Rule 10b-5 of the SEC in its purchases and sales of Air Brake stock, and Standard's request for rehearing with respect thereto, could not have affected that Court's holding that "the directors [of Air Brake] did not breach their duty of disclosure with regard to the proxy statement". (Pet. p. 30a). Standard's petition for rehearing of the part of the decision adverse to it involved only petitioner's claim against Standard and Blyth; it was thus "of no import to the matters to be dealt with on review"—the part of the decision adverse to petitioner on its claim against the proxy defendants—and it did not toll the time for petitioner to seek review: *F. T. C. v. Minneapolis-Honeywell Co., supra,* 344 U. S. at 213.

In order to avoid a jurisdictional defect, petitoner has attempted to link the issue on rehearing with its presentation of the issues before this Court by raising the question whether the Air Brake directors should have disclosed in the proxy statement that Standard had manipulated the market price of Air Brake stock (Pet. p. 3). In its complaint in the second action (No. 68 Civ. 1845), petitioner charged that Standard should have made that disclosure in the Air Brake proxy statement on the theory that Standard was unlawfully soliciting Air Brake proxies (R. 58, paras. 14 and 18). The complaint against the proxy defendants does not even refer to the manipulation claim. There is no proof that the proxy defendants had any complicity in or knowledge of the market manipulation. The record in the District Court shows that no such proof was offered and that no such allegation was made.

On appeal, although petitioner pursued its claim that the Air Brake proxy statement should have made the disclosure concerning the market manipulation, petitioner did not indicate that it was departing from its contention below that the duty of disclosure was Standard's. Petitioner did not state that the proxy defendants should have made that disclosure, nor did it allege that the proxy defendants took any part in the manipulative transactions.* Consequently, the question of Air Brake's participation in and responsibility for the market manipulation, the only link of any kind between the issue on rehearing and the present appeal, was raised for the first time in the petition and is not properly before this Court. *McCullough* v. *Kammerer Corp.*, 323 U. S. 327 (1945); *United States* v. *Classic*, 313 U. S. 299 (1941).

Petitioner could have protected itself against the time requirements of 28 U. S. C. § 2101(c) in several ways. It could have filed its own petition for rehearing. It could have filed a petition for certiorari within 90 days after the December 10, 1969, judgment. It could have applied for a 60-day extension of time because of the pendency of Standard's petition for rehearing.** But it did none of these things. The petition should therefore be dismissed in accordance with the statute limiting the appellate jurisdiction of this Court "to those cases where review is sought within a prescribed period". *F. T. C.* v. *Minneapolis-Honeywell Co.*, *supra*, 344 U. S. at 213.

II

THE COURT OF APPEALS HOLDING THAT AIR BRAKE'S PROXY STATEMENT WAS NEITHER FALSE NOR MISLEADING DOES NOT PRESENT ANY QUESTION FOR REVIEW BY THIS COURT.

A. Although petitioner purports to seek review only of questions of law, it predicates those questions on facts which are contrary to those found by the courts below.

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*Crane's brief in the Court of Appeals does contain a conclusory allegation that Air Brake knew about the manipulative inflation of the price of Air Brake stock, but fails to refer to any portion of the record in support of that allegation (Crane brief, p. 78). Such an unfounded allegation hardly can be considered to have raised the question whether the proxy defendants acted in concert with Standard.

**The original 90-day period did not expire until March 10, 1970, which was six days after Standard's petition for rehearing was denied on March 4.

In so doing, petitioner is in effect seeking review of the fundamental factual question decided twice below, *i.e.*, whether Air Brake's proxy statement falsely stated the individual defendants' reasons for recommending the Air Brake-Standard merger. Both the District Court and the Court of Appeals answered that question in the negative.* This Court has repeatedly stated that it " 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' *E.g., Graver Mfg. Co.* v. *Linde Co.,* 336 U. S. 271, 275." *Berenyi* v. *Immigration Director,* 385 U. S. 630, 635 (1967). Petitioner has not asserted that any such error was committed by the courts below and, therefore, their findings of fact are not subject to further review. Moreover, resolution of the narrow factual question decided below does not involve any question of general applicability which would merit review by this Court.

B. The decision of the Court of Appeals is not in conflict with this Court's decision in *Mills* v. *Electric Auto-Lite Co.,* 396 U. S. 375 (1970). Petitioner purports to find a conflict in two definitions of "material fact" as that phrase is used in Rule 14a-9. Even if such a conflict were to exist, and it does not, it would be irrelevant to this action. The question of whether a fact is or is not material arises only if the proxy statement contains a fact which is false or fails to set forth a fact. Both courts below found as a matter of fact that there were no false statements or omissions in the Air Brake proxy statement relating to the individual defendants' reasons for recommending the merger. Thus the Court below did not reach the question of whether certain facts relating to the merger were or were not material. The question of whether a fact is material if it "might" be considered important by a stockholder or only

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*See pp. 6-8 *supra.*

if it "would" influence the stockholder's vote is, therefore, wholly academic and not properly before this Court.

In any event, there is no conflict between this Court's decision in *Mills* and the decision below. In the decision below the Court of Appeals referred to a "material fact" as a fact "that would influence the stockholder's vote" (Pet. p. 21a). In *Mills* this Court did not define the phrase "material fact". Rather, the Court had before it the question of "what causal relationship must be shown between . . . a [materially false or misleading proxy] statement and . . . [a] merger to establish a cause of action . . ." (396 U. S. at 377). This Court concluded that causation is established if the material falsity "might" have been considered important by a reasonable shareholder and stated that a finding of material falsity undoubtedly embodies a conclusion that the fact "might" have been considered important. However, in concluding that *causation* is established if a material fact might have been considered important by a shareholder, this Court did not suggest that a fact becomes material merely because it "might" have been considered important.

C. The petition does not properly raise the question of whether a proxy statement must expressly state that a merger is being recommended for the purpose of preventing a takeover by another company. The District Court held that plaintiff failed to establish its contention that a reason for the Air Brake-Standard merger was to forestall Crane from acquiring Air Brake. (Pet. p. 41a). That finding was not disturbed by the Court of Appeals (*Id.*, p. 29a). Thus the question which the petition purports to raise is merely a hypothetical one which is not properly before this Court.

D. The question of whether the Air Brake proxy statement should have disclosed that the market price of Air

Brake stock was allegedly manipulated on April 19, 1968, similarly is not properly before this Court for the reasons set forth at pp. 11-12 above.

CONCLUSION

For the foregoing reasons Crane's petition for a writ of certiorari should be denied.

July 2, 1970

Respectfully submitted,

John W. Barnum,
Attorney for the individual respondents,
One Chase Manhattan Plaza,
New York, N. Y. 10005

Donald I Strauber,
Richard M. Hirsch,
Of Counsel.

APPENDIX A

United States Court of Appeals
FOR THE SECOND CIRCUIT

CRANE COMPANY,
Plaintiff-Appellant,
—v.—
WESTINGHOUSE AIR BRAKE COMPANY, *et al.,*
Defendants-Appellees.

CRANE COMPANY,
Plaintiff-Appellant,
—v.—
AMERICAN STANDARD, INC., *et al.,*
Defendants-Appellees.

PETITION OF DEFENDANT-APPELLEE AMERICAN STANDARD, INC. FOR REHEARING OR, ALTERNATIVELY, FOR REHEARING IN BANC

SULLIVAN & CROMWELL
GEORGE C. KERN, JR.
EDWARD W. KEANE
ROBERT M. OSGOOD
Attorneys for Defendant-Appellee
American Standard, Inc.
48 Wall Street
New York, N.Y. 10005

WILLIAM L. CARY
of Counsel

December 24, 1969

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(3) Evidence of Actual Manipulation Totally Lacking 6a

(4) Crucial Finding of Fact Violates Federal Rules 9a

CONCLUSION 10a

APPENDIX A1

United States Court of Appeals
For the Second Circuit

CRANE COMPANY,
Plaintiff-Appellant,

—v.—

WESTINGHOUSE AIR BRAKE COMPANY, *et al.*,
Defendants-Appellees.

CRANE COMPANY,
Plaintiff-Appellant,

—v.—

AMERICAN STANDARD, INC., *et al.*,
Defendants-Appellees.

PETITION OF DEFENDANT-APPELLEE AMERICAN STANDARD, INC. FOR REHEARING OR, ALTERNATIVELY, FOR REHEARING IN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, defendant-appellee American Standard, Inc. ("Standard") respectfully petitions this Court for a rehearing, or for a rehearing in banc, of the decision dated December 10, 1969, insofar as that decision finds that Standard violated Section 9(a)(2) of the Securities Exchange Act of 1934 and Rule 10b-5 of the SEC.

This Court has announced a far-reaching decision having a chilling effect upon the ability of target corporations to fend off would-be corporate raiders. Here a target corporation turned to Standard for defensive help by way of a negotiated merger. Standard, in support of the merger, tried to compete with the aggressor in the market place for shares of the target corporation. But this competition was found by this Court to constitute manipulation. Because the finding does not reflect the realities of market life in this era of corporate warfare, it beclouds the legitimacy of future efforts to maintain corporate independence. And, this issue of important consequence for an increasingly important area of corporate life has been determined by the appellate court in a factual vacuum, for it was not even tried below.

In reaching out to hold that Standard was guilty of unlawful "manipulation", this Court has based essential elements of its conclusion (a) on a presumption regarding the duration of Crane Company's ("Crane") tender offer that is indisputably wrong; (b) on "evidence" as to Crane's "forced sale" that is not in the record and has no other source than anonymous newspaper stories cited by Crane in its brief; (c) on certain stock transactions that occurred after the close of the trial and whose cause and significance depend on undisclosed facts known only to Crane itself; (d) on "facts" regarding Standard's purpose and motive assumed by this Court in contravention of specific findings of fact made by the District Court on the basis of demeanor evidence of witnesses who testified at the trial below; and (e) on assumptions regarding the operation of the stock market that are unsupported by any evidence in the record. Standard, if given the opportunity in an evidentiary hearing, stands ready to expose all of these predicates of the Court's decision as incorrect and to demonstrate on the basis of fact, not conjecture, that it was not guilty of manipulation.

Such misapprehension of the decisive facts is no happenstance, but is a direct consequence of having a different case presented to the appellate court from that which was tried below. Thus this Court in a peculiarly complex situation has taken upon itself the function of being a trier of the facts without the benefit of a trial record in which facts and inferences from facts can be developed in the crucible of presentation, cross-examination and rebuttal.

Context of the Case

This case arises out of an effort by Crane to take over control of Westinghouse Air Brake Company ("Air Brake") first by cash purchases of Air Brake stock and then by an exchange offer for the Air Brake shares which, after three extensions, expired on May 24, 1968. Air Brake opposed the Crane takeover and sought a merger with Standard. To have as many shares as possible to vote in support of the merger, Standard bought some stock of Air Brake. On April 19, to avoid becoming a 10% stockholder with consequences under Section 16(b) of the Securities Exchange Act, Standard sold some of its shares to investors who it hoped would favor the merger. At the same time Crane, through its exchange offer, was also buying the stock of Air Brake in order to have as many shares as possible to vote against the merger. By the time of the merger, Crane had accumulated more than three times as much stock as had Standard. Yet the Air Brake stockholders voted to merge with Standard by more than 2 to 1.

The whole basis of the Court's treatment of the "manipulation" point is based upon an erroneous characterization of Standard's transactions on one day, April 19, 1968, nearly a month before the Air Brake stockholders' meeting that approved the merger and five weeks before the end of Crane's exchange offer. This Court assumed that Standard's market activities on that single day were carried out with a deliberate purpose to effect "a dramatic rise in market price" (Slip op. 3898), "to deter Air Brake shareholders from tendering to Crane" (Slip op. 3901), and to "require" Crane to sell out its acquired shares (Slip op. 3900). Not one of these assumptions is based on evidence in the record.

Why Rehearing Should Be Granted

(1) Crucial Finding of Fact Contradicted by All Evidence

As the predicate of its determination of manipulative motive and effect, this Court declared: "The critical day in the takeover battle was April 19, the day Crane's tender offer for Air Brake stock was to expire." (Slip op. 3896)

The facts: Crane's offer did *not* expire on April 19. It expired on May 24—35 days after the supposedly "critical" date, and between April 19 and May 24 shareholders kept tendering to Crane. During these five weeks Crane acquired more than 490,000 shares of Air Brake stock, or approximately a third of its entire holdings as of the date of the merger and three times the amount acquired by Standard on the "critical" day.

Although these facts are undisputed, the Court's opinion rests on the entirely incorrect assumption that Crane's offer expired on April 19, the day of Standard's alleged "manipulation". In light of the additional 35 days Crane's offer was extended, and in light of the fact that during this time Crane acquired nearly half a million shares of additional stock, it is clear that April 19 was not the "critical" day. This Court's assumption that stockholders were deterred from tendering to Crane as a result of "extraordinary transactions" by Standard on April 19 (Slip op. 3896) is a palpable error.

Since the "manipulation" issue was not tried below, the trial court had no opportunity to make any findings as to the effect, if any, these one-day transactions of Standard had on the eight-week tender offer of Crane. Certainly this Court cannot properly supply the missing evidence through a series of assumptions that ignore the fact that the "defeated" tender offer survived its supposed demise for five weeks and succeeded during that period in garnering nearly half a million shares.

(2) Crucial Findings of Fact Based Entirely on Transactions After Trial and on a Newspaper Story Not in Evidence

The Court's foundation for the determination of Crane's standing: "The success of Standard's maneuver made Crane a forced seller . . . under threat of a divestiture action to be brought by Standard under the antitrust laws." (Slip op. 3908)

The facts: Crane had not sold a single share of stock at the time the trial ended. The issue of sale did not even exist at trial. There was not one word on the subject. There is no basis in the record for this Court's conclusion that Crane was a seller at all, much less a "forced seller", within the meaning of Sections 9(a) and 10(b).

The threatened "divestiture action" is not in the record, but is based on a statement made by Crane in its briefs to this Court, citing only stories in The New York Times and The Wall Street Journal (Crane Br. 6n; Crane Reply Br. 43n)—hardly a proper foundation for a key finding of fact. Nor is there any support for this Court's unexplained statement that "antitrust considerations" would compel such a sale (Slip op. 3900). Many difficult questions of both fact and law would have to be answered before any such antitrust conclusion could be made, and these questions are not answerable on this record.

The facts surrounding Crane's sales are of course in Crane's sole possession. Since these sales occurred after trial, Standard has had no opportunity to explore the facts—if any—supporting the allegation that Crane was "forced" to sell. It is a serious deprivation of Standard's rights—it is indeed a deprivation of constitutional dimensions—for this Court to hold Standard liable to Crane on the unsupported assumption that Standard "forced" Crane to sell. At the very least, Crane should be required to *prove*, at an evidentiary hearing in the District Court, that its sales were *in fact* the result of Standard's alleged threat. Merely because Crane sold a major part of its holdings during the pendency of the appeal does not make Crane a "forced seller" or otherwise imply a causal link between the alleged manipulation in April and the sales which were made in June and October. It is at least as likely that Crane sold out for such mundane motives as the wish to realize a quick profit or to generate needed cash for use in some new venture.*

Creation of a constructive sale out of this non-evidence, consisting solely of transactions after trial and material appearing only in newspapers, is a substantial and unsupported leap beyond the interpretation of "sale" given in *Vine* v. *Beneficial Finance Co.*, 374 F.2d 627 (2d Cir. 1967), *cert. denied*, 389 U.S. 970 (1968) and contrary to the reluctance shown by this Court to broaden the concept of buyer and seller in *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, —— F.2d —— (decided Nov. 3, 1969 per Lumbard, C.J., Anderson and Wyatt, JJ.).

---

* SEC Chairman Cohen testified before the Congressional Legislative Committee considering tender offers: "We have the feeling that many of these [offerors] are doing it for the short-term gain, or, to use the vernacular, to make a fast buck. We have a number of variants of that. We have a situation where almost overnight [a] particular individual or company made several millions of dollars in a situation of this kind. We have the feeling that some of these offers are made only to initiate that activity." Extensive reference was then made to Crane's offer for Air Brake by which Crane "made a profit of some $5 million to $10 million. . . ." *Hearing before the Committee on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., on H. R. 14475, S. 510, July 1, 1968, pp. 22-30.

The point is essential, for this Court specifically recognized that a violation of Section 9(a) can only be found when the defendant has acted "for the purpose of inducing the purchase or sale" of a security (Slip op. 3899), and only last month this Court squarely held that Rule 10b-5 does not give a right to relief in a tender offer situation where the plaintiff is neither a buyer nor a seller. *Iroquois Industries, Inc.* v. *Syracuse China Corp., supra* (a case in which the shareholders were in fact deterred from tendering to the plaintiff because of the defendant's illegal opposition tactics).

In short, unless there is an *established causal relationship* between the sale and the actions complained of, Crane has no right to relief in this case. Undeniably, there is and can be no such causal relationship shown by the record before this Court.

(3) Evidence of Actual Manipulation Totally Lacking

This Court did not have before it the indispensable facts from which it could make a finding of manipulation. The Court has assumed that there was in fact manipulation, intent to manipulate and the effect of manipulation solely from some sheets of stock market trading prices. Simple reports like this show nothing of the complex of effects and relationships resulting from the simultaneous pendency of an exchange offer and a merger each involving the securities of a third corporation. Rational analysis of such a situation requires a probing into such fundamental phenomena as the interplay of three sets of ever changing market prices, the varying reactions of ordinary stockholders and market professionals and changes in tactical position before and after a record date for stockholder voting.

For example, an expert understanding, impossible on this barren record, is needed of the subtleties of the double market that develops just prior to the record date for a merger. The Court ignored both the existence and the significance of two separate public markets for Air Brake stock on April 19—a "regular way market" (in which stock was sold without a vote) and a special, temporary "cash market" (in which stock was sold on an accelerated-delivery basis so that the purchaser would acquire a vote through delivery prior to the April 23 record date for voting on the merger). As is perfectly normal in such situations (Crane concedes this), cash trades run several points higher than regular way trades, the purchaser in effect paying a premium price for the right to obtain a vote. Although the ticker tape reports both regular-way and cash trades, identifying cash trades with a special symbol, newspapers report only the regular-way market.

There is not the slightest basis for the Court's assumption that particular transactions in the special cash market on April 19 could have had any effect on the separate regular-way market or have deterred Air Brake stockholders from tendering to Crane. Since only a party to a proxy contest has any conceivable interest in paying a substantial premium by purchasing in the cash market merely to acquire a vote, and since the tape identifies cash-market transactions by the symbol "c", the tape-watching public could not have been deceived by reports that cash sales momentarily reached 50 on April 19. Anyone watching the tape would have readily assumed that Standard (or perhaps Crane or Air Brake) was purchasing stock with proxies attached, and for the obvious purpose of voting those proxies at the forthcoming Air Brake stockholders' meeting. A non-participant in the proxy contest would have had no reason to purchase in the cash market at a 2 to 4 point premium.

Significantly, though several acknowledged experts on securities transactions testified below on issues other than "manipulation", Crane made no effort to prove that anyone at all—least of all Crane itself—was deceived even for an instant as to what was happening. This is a void in the evidence that this Court has filled through sheer hypothesis.

Thus there is no support for the Court's statement that "the effect of these purchases was to create the appearance of an extraordinary demand for Air Brake stock and a dramatic rise in market price . . ." (Slip op. 3897-98). The special cash market's rise to 50 on April 19 was *not* a rise in the regular-way market, which never rose above 47⅞ on that day, but was solely a peak reached by the cash market in which only Standard (and perhaps others of the principals—who knows, since there was no evidence?) took part as a buyer. In short, the rise to 50 in the cash market in no way implied any "extraordinary demand" for Air Brake stock sold in the normal market (without proxy) but only demand for stock instantly available with vote, a known demand generated by the participants in the well-publicized proxy battle. That demand, far from being artificial, was wholly genuine, and far from being secret, was common knowledge. Furthermore, the assumption that Standard's one-day transactions in the cash market artificially inflated the price and thereby deterred tenders to Crane is inconsistent with the actual pattern of trading in Air Brake stock during the period of Crane's exchange offer, as disclosed by published reports of trading on the New York Stock Exchange for the months of April and May, which we annex as an appendix to this petition.

In fact, the regular-way market showed no unusual rise on April 19. On April 10, April 11, April 15 and April 16—four of the six trading days just *prior* to the date of the alleged manipulation—Air Brake stock was traded at levels substantially *higher* than 47⅞, the published high for April 19 when the alleged manipulation occurred. Moreover, although Standard completely withdrew from the market after April 23—more than a month before the final expiration of Crane's tender offer—the market price remained within a fraction of the April 19 price through the following week, then rose during the week of April 29 to a high of 48⅜, a half point above the April 19 high. The stock remained at approximately this level during the two succeeding weeks, when it was traded above 48 on six out of the ten trading days.

Even as to the effects of the transactions on April 19 itself the Court's inferences appear all the more vulnerable in light of the fact that 316,662 shares were tendered to Crane on that date, nearly twice the number acquired by Standard.

These facts must be sorted out by a proper trier of facts. They cannot be dealt with in the first instance by the appellate court unaided by a relevant record.

(4) Crucial Finding of Fact Violates Federal Rules

This Court properly recognizes that "both manipulative motive and wilfulness" are elements of the offense of market manipulation (Slip op. 3899), and the Court further recognizes that the District Court—which observed the testimony under extensive cross-examination of all of the key individuals who executed the transactions in question—found that Standard was buying Air Brake shares for the purpose of voting in favor of the merger (Slip op. 3895). The Court nevertheless summarily disregards the District Court's findings of fact on the stated ground that Standard's evidence is "unconvincing", and instead substitutes its own conclusion as to purpose and intent (Slip op. 3901).

As the District Court found after listening to the witnesses testify, Standard's willingness to pay up to $50 a share for stock with proxy was motivated by the fact that its success or failure in the ongoing proxy fight might well hinge on the number of voting shares it could acquire in the open market, especially as Crane was known to have acquired substantially larger blocks of voting shares. And contrary to this Court's assumption that it was in Standard's interest to have Air Brake stock rise in price, Standard in fact had every reason to fear such a rise, for not only would every increase add to Standard's acquisition cost but, more important, such a rise would make the contested merger with Standard look less attractive to the Air Brake stockholders and thereby increase the likelihood that the merger would be voted down at the forthcoming stockholders' meeting.

In assuming illicit motives in contravention of the District Court's finding as to what Standard was in fact seeking to accomplish, this Court has ignored the requirements of Rule 52(a) of the Federal Rules of Civil Procedure. This Court does not even claim that the District Court was "clearly erroneous" on the question of "manipulative motive and wilfulness".

Even if the District Court's findings were deemed incomplete or premised on an incorrect view of applicable legal standards, the appropriate disposition would be to remand the case for new findings by the District Court, and not to make a factual determination on appeal unaided by a pertinent record.

But the root of the problem is that the trial court never had a chance to make findings on the crucial elements of what has turned out to be the "manipulation" case, since no such case was presented by Crane at the trial below. Where essential findings have not been made, this Court has recognized that the proper procedure is to remand for new or additional findings. *In re 716 Third Ave. Holding Corp.*, 340 F.2d 42, 45-48 (2d Cir. 1964).

CONCLUSION

This petition for rehearing, or rehearing in banc, should be granted and on rehearing the judgment should be affirmed or the case remanded for an evidentiary hearing on the issue which has never been tried.

Respectfully submitted,

SULLIVAN & CROMWELL
GEORGE C. KERN, JR.
EDWARD W. KEANE
ROBERT M. OSGOOD
Attorneys for Defendant-Appellee
American Standard, Inc.
48 Wall Street
New York, N.Y. 10005

WILLIAM L. CARY
of Counsel

December 24, 1969

APPENDIX

Westinghouse Air Brake Company Market Price For Stock as Quoted in The New York Times

Date 1968 April		*New York Stock Exchange Price*	
		High	*Low*
1		43	42
2		44	42¼
3		44	42¾
4		44¼	43⅜
5		44⅛	43½
6	Saturday		
7	Sunday		
8		47⅜	46¾
9	Exchange Closed		
10		49⅜	48¼
11		49½	48¾
12	Holiday		
13	Saturday		
14	Sunday		
15		49½	48⅝
16		48½	47½
17		47¼	45¼
18		46⅞	45
19		47⅞	44¾
20	Saturday		
21	Sunday		
22		47⅝	45⅞
23		47⅛	46½
24		47	46½
25		47⅛	46½
26		47	46½
27	Saturday		
28	Sunday		
29		46⅝	46½
30		47	46¼

WESTINGHOUSE AIR BRAKE COMPANY MARKET PRICE FOR STOCK AS QUOTED IN THE NEW YORK TIMES

Date		*New York Stock Exchange*	
1968		*Price*	
May		*High*	*Low*
1		47⅝	47
2		47¾	47⅜
3		48⅜	47⅛
4	Saturday		
5	Sunday		
6		47¾	47¼
7		48¼	47½
8		48¼	47⅞
9		48⅛	47⅞
10		48¼	47⅞
11	Saturday		
12	Sunday		
13		48¼	47⅞
14		47⅝	46¼
15		47¾	47⅜
16		48⅛	47¼
17		47¼	47
18	Saturday		
19	Sunday		
20		46⅞	46⅜
21		46⅜	46⅛
22		45¾	45⅛
23		46⅜	45½
24		46⅛	45⅞
25	Saturday		
26	Sunday		
27		46¼	45¾
28		45¾	45¼
29		46	45½
30	Holiday		
31		47½	45⅜

APPENDIX B

32569-72

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

◆

CRANE CO.,
Plaintiff-Appellant,
v.

WESTINGHOUSE AIR BRAKE COMPANY, *et al.,*
Defendants-Appellees,
(and another case).

CRANE CO.,
Plaintiff-Appellant,
v.

AMERICAN STANDARD, INC., and BLYTH & CO., INC.,
Defendants-Appellees,
(and another case).

◆

A petition for a rehearing having been filed herein by counsel for the appellee American Standard, Inc.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

....
J. Edward Lumbard

....
J. Joseph Smith

....
Irving R. Kaufman
Circuit Judges

March 4, 1970

32569-72

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CRANE CO.,
Plaintiff-Appellant,
v.

WESTINGHOUSE AIR BRAKE COMPANY, *et al.*,
Defendants-Appellees,
(and another case).

CRANE CO.,
Plaintiff-Appellant,
v.

AMERICAN STANDARD, INC. and BLYTH & CO.,
Defendants-Appellees,
(and another case).

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee American Standard, Inc., and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

....

J. Edward Lumbard
Chief Judge

March 4, 1970

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JUL 8 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 212

CRANE CO.,

Petitioner,

—v.—

WESTINGHOUSE AIR BRAKE COMPANY, A. KING MCCORD, EDWARD J. HANLEY, EDWIN HODGE, JR., FRANK L. MAGEE, JOHN A. MAYER, G. ALBERT SHOEMAKER, ERIC L. WALKER, LAWRENCE E. WALKLEY, JAY V. WILCOX, LESLIE B. WORTHINGTON, AMERICAN STANDARD and BLYTH & CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY PURSUANT TO RULE 24(4) ON THE ISSUE OF TIMELINESS

JOHN W. CASTLES 3D
Attorney for Petitioner
25 Broadway
New York, N. Y. 10004

July 8, 1970

WENDELL DAVIS, JR.
MICHAEL J. MURPHY
of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1642

CRANE CO.,

Petitioner,

—v.—

WESTINGHOUSE AIR BRAKE COMPANY, A. KING MCCORD, EDWARD J. HANLEY, EDWIN HODGE, JR., FRANK L. MAGEE, JOHN A. MAYER, G. ALBERT SHOEMAKER, ERIC L. WALKER, LAWRENCE E. WALKLEY, JAY V. WILCOX, LESLIE B. WORTHINGTON, AMERICAN STANDARD and BLYTH & CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY PURSUANT TO RULE 24(4) ON THE ISSUE OF TIMELINESS

Respondents argue that petitioner's petition for a writ of certiorari was filed too late to give this Court jurisdiction. There are two separate and independent grounds why the petition for certiorari is not late: (1) it was filed within ninety (90) days of the Court of Appeals' denial of a *timely* petition for rehearing; and (2) the issues to which it is addressed are inextricably linked with those posed by the petition for rehearing.

First: *Standard's timely petition for rehearing on the manipulation issue tolled the time for Crane to petition for certiorari on the issues encompassed within its certiorari petition.*

It is settled that the time to petition for certiorari begins to run from the date of the denial of a timely petition for rehearing.

> "Where a timely motion is filed, the time in such cases runs from the date of the order overruling the motion. See *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944); *Foreman* v. *U. S.*, 361 U.S. 416 (1960)." *United States* v. *Adams*, 383 U.S. 39, 41, fn. 1 (1966).

The filing of the petition for rehearing suspends the finality of the judgment. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Here the Court of Appeals entered a single judgment on December 10, 1969* on an appeal from a final judgment of the District Court dismissing Crane's consolidated complaint against all defendants. Pet. p. 62a. Crane did not, as Individual Respondents' Brief asserts (p. 7), file "four separate appeals." A single notice of appeal was filed by Crane on June 21, 1968 from the final judgment of the District Court. R. 47. Crane's two complaints, both of which attacked the proposed merger of Air Brake into Standard had been consolidated "for all purposes" by the District Court on May 14, 1968. R. 24. Standard's petition for rehearing was filed within the allowed fourteen days.

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* Although the judgment was entered on December 10, 1969, the mandate of the Court of Appeals pursuant to Rule 41(a) of the Rules of Appellate Procedure did not issue to the District Court until after the denial of the rehearing petition. Thus the Court of Appeals treated the entire judgment as a single entity.

The effect of the rehearing petition was to enable the Circuit Court, if it so desired, to review the entire judgment, not just the portion on which rehearing was sought. *Continental Cas. Co.* v. *American Fidelity & Cas. Co.*, 186 F. Supp. 173, 178-180 (S.D. Ill., 1959), *aff'd*, 275 F.2d 381 (7th Cir., 1960); *United States* v. *Bentley & Sons Co.*, 293 Fed. 229, 237 (E.D. Ohio, 1923); *United States Nat. Bank* v. *Great Western Sugar Co.*, 60 Mont. 342, 351-52, 199 P. 245, 248 (1921); *Conway* v. *Fabian*, 108 Mont. 287, 321-22, 89 P.2d 1022, 1036 (1939); *Colesar* v. *Star Coal Co.*, 255 Ill. 532, 544, 99 N.E. 709, 714 (1912); *Bergman* v. *Board of Education*, 30 Ill. App.2d 65, 68-69, 173 N.E.2d 565, 567 (1961). Accordingly, Standard's petition for rehearing filed on December 24, 1969 suspended in all respects the finality of the December 10, 1969 judgment of the Court of Appeals. Therefore, Crane's time to petition for certiorari was tolled on all issues encompassed by the December 10, 1969 judgment until the denial of Standard's petition for rehearing on March 4, 1970. *United States* v. *Adams, supra.*

Respondents' reliance on ***FTC*** v. *Minneapolis Honeywell Co.*, 344 U.S. 206 (1952) is misplaced. In that case the petitioner's application to modify the Circuit Court's judgment was *not timely*. Accordingly, it could not operate to suspend any part, let alone all, of the Circuit Court's judgment.

Second:* *The issues raised by Crane's petition for certiorari are "inextricably linked" with the issues raised by Standard's rehearing petition.

In *United States* v. *Adams, supra,* this Court ruled that where issues raised by a petition for rehearing or motion to amend or modify a judgment are inextricably linked with issues raised by a petition for certiorari, the latter is timely if filed within 90 days of the lower court's disposition of the rehearing petition. In the *Adams* case, this Court distinguished its decision in *Minneapolis-Honeywell* as follows:

> "[F]irst, because that case did not involve a timely motion to amend the judgment and, secondly, because here the Government's liability was inextricably linked with the alleged contract action which was not determined until the latter judgment." 383 U.S. at 41-42 (footnote omitted).

Here the challenge to the Air Brake/Standard merger on the ground of the misleading character of the Air Brake proxy statement is inextricably linked to the challenge to the same merger on the ground of the manipulation of Air Brake stock on April 19, 1968. Both grounds directly concern steps essential to the consummation of the merger of Air Brake into Standard.* Moreover, one of the grounds on which the Air Brake proxy statement was claimed to be deficient lay in its failure to reveal the transactions in Air Brake stock which constituted the illegal manipulation. Clearly review of the question of the materiality of

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* After consummation of the merger on June 7, 1968, Standard is the party responsible for all defects in the Air Brake proxy statement. To this extent, Crane's proxy claims and its manipulation claims are against the same defendant, Standard.

Air Brake's failure to inform its shareholders of the transactions constituting the manipulation of Air Brake stock should await the Court of Appeals ruling on the petition for rehearing challenging its decision that these transactions were manipulative. In the absence of a finding of manipulation, there clearly could be no violation of the proxy rules in the failure to disclose the transactions upon which the claim of manipulation was based.

Individual Respondents' brief in opposition to Crane's petition for certiorari attempts to avoid the linkage between the manipulation on April 19th, and the omission of all reference thereto in the Air Brake proxy statement, by asserting that Crane did not contend below that the Air Brake proxy statement was deficient in omitting any reference to the manipulative wash transactions in Air Brake stock on April 19. Individual Respondents' assertion is incorrect and is contrary to the record. Crane contended before the District Court that the Air Brake proxy statement was deficient in not revealing that Standard was selling as well as purchasing Air Brake shares.* R. 41, ¶5. Crane also argued before the District Court that the Air Brake proxy statement was deficient in not revealing the manipulative transactions in Air Brake stock; the District Court in its opinion expressly acknowledged these contentions of Crane.** Pet. p. 37a. Crane in its brief to the Court of Appeals argued that Air Brake's proxy statement was deficient in omitting reference to the manipulative transactions in Air Brake stock. (See pages 78-79 of Crane's Brief to the Court of Appeals, attached hereto as Appendix A.) The record established and the Circuit Court found that:

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* The manipulation consisted of Standard selling secretly 120,000 shares of Air Brake on the same day it purchased 170,000 shares of Air Brake at a loss of one-half million dollars. Ex. 30; R. 56, p. 572.

** At the close of all the proof at the trial, Crane moved to amend the pleadings to conform to the proof. The District Court stated this would not be necessary for "In Federal Court all pleadings are deemed to be amended to conform to the proof." R. 51, p. 881.

> "Standard was an 'insider' with respect to the trading of Air Brake stock. Standard was acting in concert with the Air Brake management, with whom it was on the verge of consummating a merger. Standard regularly and systematically informed the Air Brake management of its transactions in Air Brake's stock." * Pet. p. 15a.

In the face of this express finding by the Court of Appeals, there is simply no basis whatsoever for the Individual Respondents' assertion at page 12 of their brief that Crane's claim that "Air Brake knew about the manipulative inflation of the price of Air Brake" was "an unfounded allegation."

Obviously Air Brake is responsible for the deficiencies in *its* proxy statement. Particularly is this so where Air Brake had knowledge of, and was *particeps criminis* in the manipulative transactions. Individual Respondents' contention in their brief that Crane had not contended that Air Brake was responsible for its failure to inform its shareholders of the manipulative transactions is simply frivolous.

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* Individual Respondents' statement in their brief that "there is no proof that the proxy defendants had any complicity in or knowledge of the market manipulation" (Individual Respondents' brief, p. 11) is totally incorrect.

There can be no question that not only should Air Brake have informed its shareholders of the manipulative transactions, but this issue on certiorari is inextricably linked to the issues to which the rehearing petition was directed.

These are not the only respects in which Individual Respondents' brief is in error. At page 12 it claims that Crane could have protected itself by filing a petition for certiorari within 90 days after December 10, 1969. We have shown above that this contention is without substance on two separate and independent grounds: (1) the effect of the filing of a timely petition for rehearing and (2) the inextricable link between the rehearing issues and the certiorari issues. Moreover, Individual Respondents' contentions, if adopted by this Court, would lead to the multiplication, in many cases, of the number of petitions and briefs filed with this Court. It would force an aggrieved party to file its petition for certiorari before it knew for certain what the Court of Appeals judgment had determined. For example, Crane would be obliged to file a certiorari petition to review the proxy rulings before it knew whether to include within the scope of its petition a possible adverse decision on the manipulation claim after rehearing. This could require two petitions to review a single judgment.

Wherefore, it is respectfully submitted that Crane's petition was timely and that a writ should issue vacating that part of the judgment below which affirmed the dismissal of Crane's consolidated complaint and remanding the case to the Court of Appeals for further consideration in light of *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

Respectfully submitted,

John W. Castles 3d
Attorney for Petitioner
25 Broadway
New York, N. Y. 10004
(212) 344-8480

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Wendell Davis, Jr.
Michael J. Murphy
of Counsel

APPENDIX A

Crane's Brief in the Court of Appeals, pages 78-79

Third: The non-disclosure of the manipulative transactions was a material omission under Rule 14a-9.

Air Brake's proxy statement was designed to induce the Air Brake stockholders not to tender their Air Brake stock and to vote for the Standard merger. The Air Brake stockholders were given a "WARNING" against tendering to Crane and were told that an independent consultant had advised against the Crane merger. Standard's manipulation of the market price was for the same purpose, i.e., to deter the Air Brake shareholders from tendering their stock to Crane.

Rule 14a-9 requires a disclosure of any material fact "necessary to correct any statement in any earlier communication." Here the proxy statement published during the week of April 8th innocuously recited at page 6 that Standard "may purchase for cash WABCO common stock over securities exchanges or otherwise from time to time." The stockholders were never informed of Standard's manipulation of the market in Air Brake stock. Disclosure of the fact that Standard's management, with Air Brake's knowledge, found it necessary to resort to illegally inflating the market price for the Air Brake stock at a cost of over one-half million dollars to deter tenders to Crane could and would have had a substantial influence on an Air Brake shareholder's choice of alternatives. The very fact that an illegal device was used against the Crane exchange offer would affect a stockholder's judgment as to the integrity of management and the validity of its recommendations. (See *SEC* v. *Capital Gains, supra.*) The very fact that such means at a cost of one-half million dollars—and moneys of the entity to be merged—were employed against the Crane exchange offer would suggest that Standard's and Air Brake's management did not dare rest on the respective merits of the two competing offers to the Air Brake shareholders. The importance of disclosing that a market price is a product of manipulation has been emphasized by the SEC in *Russell Maguire Co. Inc., supra.* There it was held that a failure to disclose that the market price at which stock had been sold was the product of illegal manipulation was a material omission in violation of Section 17a of the 1933 Act, the prototype for Rule 10b-5.

Fourth: The District Court's decision

The District Court made no mention in its opinion of Standard's manipulation of the price of Air Brake stock.